

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,535

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

FILED NOV 1 1952

M. I. O'BOYLE & SONS, INC.,

vs.

INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC.,
E. BROOKE MATLACK, INC., and
LEAMAN TRANSPORTATION CORPORATION,

Appellees.

**Appeal from the United States District Court
for the District of Columbia**

RALPH E. CURTISS
CLARENCE D. TODD
DALE C. DILLON
Washington Building
Washington, D. C.
Attorneys for Appellant

Of Counsel
TODD, DILLON & CURTISS

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether a Report of the Interstate Commerce Commission which interprets the term "to the site of" as used in Appellant's Certificate of Public Convenience and Necessity, contrary to a construction thereof by a Federal Court in a prior case, and which is issued without evidence of what constitutes such site or without an accompanying Order requiring any specific action on the part of the Appellant, is prima facie evidence of the scope of such certificate in a Court trying the merits of an injunction proceeding brought by the Commission for enforcement of such certificate; and, if so, whether the interpretation given to the term by the Commission is arbitrary and capricious.

2. The further question is whether the reasonable construction given to a certificate authorizing service "to the site of" a military reservation would require Appellant lawfully to operate to a point within the fenced enclosure of the military reservation.

TABLE OF CONTENTS

	PAGE
Statement of Questions Presented.....	Flyleaf
Jurisdiction	1
Statement of Case.....	2
Statutes Involved	5
Statement of Points.....	7
Summary of Argument.....	8
Argument	9
1. Orders Before Court for Construction and Enforcement	9
2. Commission's Interpretation is Arbitrary.....	11
3. Appellant Has Operated Its Vehicles Through the Site of Bolling Field.....	20
Conclusion	23

Cases Cited

Brooklyn Eastern Dist. Terminal v. U. S. D.C.N.Y. 1927, 28 F. 2d. 634.....	9
Canadian River Gas Co. v. Federal Power Comm., 113 F. 2d. 1010.....	9
Gibson Wine Co. v. Snyder, 194 F. 2d 329, 332.....	10
Adirondack Transit Lines, Inc. v. U. S. et al 59 F. Supp. 503	10
Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, 42 M.C.C. 123 and 43 M.C.C. 477.....	10
Republic Oil Refining Co. v. Granger, 198 F. 2d 161....	14
Matkin v. Marengo County, 34 So. 171, 174; 137 Ala. 155	16
Coastal Tank Lines, Inc. v. Charlton Bros. Transportation Co., Inc., 48 MCC 289, 302.....	17
Garrett Freight Lines, Inc., Ext. Yellowstone Nat'l Park 49 M.C.C. 631.....	17
Missouri Pac. Transportation Co. Extension—Fort Leavenworth 41 M.C.C. 545.....	17

	PAGE
Kansas City & Leavenworth Transportation Co. v. United States et al 51 F. Supp. 916.....	18
I. C. C. v. Chigo. B & Q.R. Co., 186 U.S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep 824.....	19
White Star Bus Lines, Inc. v. People, 75 F. 2d 889.....	19
Stephan v. Commissioner of Internal Revenue, 197 F. 2d 712	21
Alexander, B. & W. Transit Co. Ext Washington Air- port, 30 M.C.C. 618.....	22
New York, N.H. & H.R. Co. v. I.C.C., 200 U.S. 361, 50 L. ed, 515, 26 Sup Ct. Rep. 272.....	22
Borelli v. Reconstruction Finance Corp., 196 F 2d 730	22
Barringer v. Mille 77 A 2d 895, 6 N.J. 139.....	22
New York N.H. & H.R. Co. v. I.C.C. 200 U.S. 361, 50 L ed. 515, 26 Sup. Ct. Rep 272.....	22

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,535

M. I. O'BOYLE & SONS, INC.,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC.,
E. BROOKE MATLACK, INC., and
LEAMAN TRANSPORTATION CORPORATION,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTION

This suit was brought and the jurisdiction of the United States District Court for the District of Columbia was invoked under the provisions of Sections 204 (a) (6) and 222 (b) of the Interstate Commerce Act (49 U.S.C. 304 (a) (6) and 322 (b)), and under the general laws and

rules relating to suits in equity arising under the Constitution and laws of the United States. An appeal from the judgment and decision of the U. S. District Court is taken pursuant to Act of June 25, 1948, c. 646, 62 Stat. 929, U.S.C.A. Title 28, sec. 1291.

STATEMENT OF CASE

The Interstate Commerce Commission in its Docket No. MC-106965 Sub 15, on the 23rd day of January, 1952, issued to appellant a certificate of public convenience and necessity, authorizing its operation as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of petroleum products, in bulk, in tank vehicles from specified origins in New Jersey and Pennsylvania "to the site of Bolling Field in Washington, D. C." (Jt. App. 40A). Prior thereto, to wit, on the 19th day of May 1947, the Interstate Commerce Commission had issued to Appellant a certificate of public convenience and necessity authorizing its operation as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points and places in the Washington Commercial Zone to specified points or areas in Maryland, Virginia and West Virginia. (Jt. App. 3A) Pursuant to a combination of these operating authorities appellant has transported shipments from the origins in New Jersey and Pennsylvania to destinations in Maryland and Virginia.

The physical operation with respect to such shipments has been over public highways which traverse the District of Columbia and are contiguous to the military reservation known as Bolling Air Force Base, also known as Bolling Field. One of these highways, South Capitol Street, for a substantial distance is parallel to the fence that encloses the military property and passes under

another highway, Portland Street, which is at a right angle to such fence and leads to the gates or main entrance to the field. A side road between South Capitol Street and the fence is the means of ingress and egress for vehicles using South Capitol Street. The vehicles of Appellant have been operated from South Capitol Street across the apron and across Portland Street at the entrance gates and back onto South Capitol Street. It is the contention of Appellant that in such operation its vehicles are operated to and from "the site of Bolling Field". (See Plaintiff's Request For Admission of Facts Under Rule 34 and Defendant's Reply Thereto, (Jt. App. 42A and 45A).

Certain motor carrier competitors of Appellant, which had participated as interveners in the case, approximately four months after the issuance of the certificate of public convenience and necessity in No. MC-106965 Sub 15, filed with the Commission a petition for reopening and reconsideration. Appellant filed a motion to dismiss such petition for the reason that a certificate of public convenience and necessity can be revised, or revoked in whole or in part only in accordance with the provisions of section 212 (a) of the Act. (49 U.S.C. 312 (a)).

The Interstate Commerce Commission, by its Division 5, on the 10th day of October 1950, entered a report which it described as a report on reconsideration in its docket No. MC-106965 (Sub No. 15) with the folio title "M. I. O'Boyle & Son, Inc., Interpretation of Certificate" in which it made the following finding:

We find that applicant may combine or tack the authority granted herein certificate No. MC 106965 (Sub No. 15) and that in certificate No. MC 106965, only by operating through the site of Bolling Field, Washington, D. C., as a gateway. (Jt. App. 15A)

No order was entered in connection with such report and no action has been instituted by the Commission to

revoke, modify or amend the certificate issued to Appellant on January 23, 1950, in MC-106965 Sub 15, or the certificate issued to Appellant on May 19, 1947 in MC-106965.

This action which was instituted by the Interstate Commerce Commission by filing its complaint in the United States District Court for the District of Columbia, on the 25th of September, 1951, is the first and only action taken by the Interstate Commerce Commission to require Appellant to change its manner of operation pursuant to its certificates of public convenience and necessity. (Jt. App. 2A)

The lower Court enjoined appellant "from in any manner or by any device, directly or indirectly, transporting petroleum products in bulk, in tank trucks, by motor vehicle in interstate commerce for compensation over irregular routes on public highways from any origin point or points located in the Counties of Delaware or Philadelphia in Pennsylvania or in the Counties of Bergen, Essex, Gloucester, Camden, Hudson, Union, or Middlesex in New Jersey to any destination point or points of Martinsburg or Shepherdstown in West Virginia, any point or place in Maryland, or those in that part of Virginia on and north of U. S. Highway 60 except those in Accomac and Northampton Counties in Virginia, unless the defendant, in the course of such transportation, passes through the military reservation known as Bolling Field, in the District of Columbia, or unless and until such time, if at all, as there is in force with respect to the defendant a certificate of public convenience and necessity or other appropriate operating authority issued by the Interstate Commerce Commission authorizing such transportation from said origin point or points to said destination point or points without the requirement that the defendant traverse said Bolling Field in the course of such transportation." (Jt. App. 59A)

The finding of facts on which the decree of the lower court is based as set forth in its judgment of Permanent Injunction are as follows:

"It appearing to the Court that defendant is operating its vehicles on highways adjacent to and outside of the military reservation of Bolling Field, that such operation does not comply with the terms of its operating rights as those rights were interpreted by the Interstate Commerce Commission, and that such operation is in violation of the provisions of 49 U.S.C. 306 (a) (1), the Court, on June 19, 1952, granted the motion of plaintiff for summary judgment and denied the motion of defendant for summary judgment". (Jt. App. 58A)

STATUTES INVOLVED

Section 206 (a) (1) of the Interstate Commerce Act (49 U.S.C. 306 (a) (1)), in so far as it is pertinent in this case, reads as follows:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations.

Section 207 (a) of the Interstate Commerce Act (49 U.S.C. 307 (a)) reads as follows:

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the

extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Section 208 (a) of the Interstate Commerce Act (49 U.S.C. 308 (a) reads as follows:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 212 (a) of the Interstate Commerce Act (49 U.S.C. 312 (a) reads as follows:

Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein pro-

vided. Any such certificate permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty days to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier, or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

STATEMENT OF POINTS

1. The certificate of public convenience and necessity issued to Appellant and the Report authorizing such issuance are the only findings and orders of the Interstate

Commerce Commission before the Court for construction or interpretation, and the lower Court erred in giving the subsequent Report of the Commission interpreting these certificates the force of a bona fide finding and order.

2. The lower Court erred in failing to find arbitrary and capricious the interpretation placed upon Appellant's certificate, when such interpretation was contrary to the findings of the Commission and a Federal Court in a prior case, and also was contrary to the plain meaning of the words used therein.

3. The lower Court erred in failing to find that Appellant is and has been operating its motor vehicles to and from the site of Bolling Field in accordance with its operating authorities.

4. The lower Court erred in enjoining the Appellant from the further conduct of operations which Appellee had failed to prove unlawful.

SUMMARY OF ARGUMENT

Appellant was issued a certificate of public convenience and necessity which authorized it to transport shipments "to the site of Bolling Field in Washington, D. C." The phrase "to the site" in a prior case had been interpreted by the Commission and a Court to specifically grant authority only to the gate or entrance to the military reservation. Appellant accepted its certificate in the light of such interpretation and a later interpretation by the Commission which required appellant to go to some undisclosed point in the military reservation to reach the destination specified in such certificate was arbitrary, capricious and a revision of appellant's certificate contrary to the provisions of Section 212 (a) of the Interstate Commerce Act.

ARGUMENT

1. Orders Before Court for Construction and Enforcement.

The Interstate Commerce Commission in a report and order by Division 5 thereof, on the 1st of November 1949, found that public convenience and necessity required operation by appellant as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of petroleum products, in bulk, in tank vehicles, from specified origins in New Jersey and Pennsylvania "to the site of Bolling Field, in Washington, D. C." A certificate of public convenience and necessity authorizing such operation was issued on the 23rd day of January, 1950. The report and order of November 1, 1949, and the certificate of January 23, 1950, are the only orders of the Commission which are before the Court for enforcement.

The Commission, after the issuance of the certificate, issued a report which it described as "Interpretation of Certificate" but such report was not made a part of an order by incorporation, and no order ever was issued to implement the findings in such report. A mere expression of opinion by the Commission is not an order that is reviewable or enforceable by the Courts. See *Brooklyn Eastern Dist. Terminal v. U. S.* D.C.N.Y. 1927, 28 F. 2d. 634, and *Canadian River Gas Co. v. Federal Power Comm.*, 113 F. 2d. 1010.

The lower Court gave the same consideration to the report entitled "Interpretation of Certificate" that courts customarily give to decisions of the Commission based on evidence which requires a specific finding of facts, or which involve a regulation implementary to some provision of the Interstate Commerce Act. The report of the Commission was not based on any evidence as to what constituted the site of Bolling Field and was not a regulation or ruling which involved a technical interpretation

requiring the expert knowledge of the Commission. It was an interpretative ruling which should have been treated by the court as a mere expression of opinion. *Gibson Wine Co. v. Snyder*, 194 F. 2d 329, 332.

Appellant concedes that the Commission in a proper case, and supported by substantial evidence, could interpret Appellant's certificate, and that such interpretation should not be disregarded by the Courts unless such interpretation is clearly erroneous or arbitrary. Such interpretation was upheld by a three-judge court in *Adirondack Transit Lines, Inc. v. U. S. et al*, 59 F. Supp. 503, affirmed 324 U. S. 824, 65 S. Ct. Rep. 688. The proceeding before the Commission was based upon a complaint filed by competitors and a hearing was held, a report and recommended order of an examiner was served on the parties, briefs were filed, a report of Division 5 of the Commission was issued, the case was reopened and the entire Commission issued its report which was accompanied by a cease and desist order. See *Manhattan Coach Lines, Inc. v. Adirondack Transit Lines*, 42 M.C.C. 123, and 43 M.C.C. 477.

The issue in the above-cited case was whether a certificate which authorized operation from Weehawken, N. J., "across the Hudson River to New York" authorized the holder thereof to operate through a tunnel under the river, which was not in existence when the certificate was granted. The Court, in its decision, pointed out that "the certificate does not authorize transportation under but merely 'across' the river". The issue would be quite different in the instant case if the Commission, after a full hearing and consideration of the arguments of the parties, had found that the phrase "to the site of Bolling Field" meant some definable terminus within the fenced enclosure of Bolling Field and had issued an order requiring compliance with such finding. As it is, however, the conclusions of the Commission are unsupported by facts as to

what constitutes the site of Bolling Field or by an Order requiring Appellant to take any specific action.

We submit, therefore, that the Report of November 1, 1949 and the certificate issued January 23, 1950 are the only Report and Order which are prima facie evidence in the instant proceeding. The burden is on the Government in this case to prove that Appellant is violating some specific requirement of the certificate, and in going forward with that burden the certificate and the Report in which issuance thereof was authorized are the only expressions of the Commission acceptable as evidence in the enforcement proceeding.

2. Commission's Interpretation is Arbitrary.

While it is our continued position that the Commission's Report entitled "M. I. O'Boyle & Son, Inc., Interpretation of Certificate" was in no way binding upon the lower Court, the fact is that the Court apparently did consider it binding and determinate of the issues herein, for in the Order issuing the injunction it recited "that such operation does not comply with the terms of its operating rights as those rights were interpreted by the Interstate Commerce Commission". We will attempt to show under this heading therefore that the opinion relied upon by the lower Court is arbitrary and capricious. The pertinent portion of the Report, 52 M.C.C. 248 at page 251 reads as follows:

"There remains for consideration here the question as to whether or not the term 'the site' as contained in applicant's certificate No. MC-106965 (Sub No. 15) confers the right to serve outside streets or highways bordering the military reservation, enabling applicant to combine or tack the authorities involved by operating over those streets or highways without actual operations within the field. A site is a plot of ground suitable or set apart for some specific use, and occupied for that purpose. As used in the certificate the

term includes only those grounds within the military reservation and does not include adjacent streets, areas, or land in the vicinity. We conclude, therefore, that the highways or streets leading to the gate or adjoining the outer boundary of the military reservation are not authorized points of service which can be said to be points of service common to both authorities and that accordingly the two authorities may not be combined or tacked by any theoretical interchange at any point or any such highway or street. We conclude further that applicant may combine or tack the referred to authorities in the manner hereinafter conducted thereunder include a physical operation through Bolling Field. If the military officials in charge of the field prohibit such a physical operation, thus preventing applicant from meeting the above-described condition, it may not combine or tack the involved authorities."

The arbitrariness of the Report is shown not only in the conclusions reached therein but also in the procedural steps leading up to its issuance. As previously stated, the Commission authorized Appellant to serve "to the site of Bolling Field" in a Report decided November 1, 1952. Thereafter on January 23, 1950 a certificate of public convenience and necessity authorizing such operation was issued to Appellant. The Commission's General Rules of Practice, Rule 101 (e) thereof, provide that "Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order." The Report of the Commission of course granted a portion of the requested authority, and therefore the date for filing a petition under the rule had expired on December 1, 1949. Despite this and the fact that a certificate had already been issued to Appellant, the Commission reopened the proceeding for reconsideration on the present record upon the basis of a petition filed ap-

proximately four months after the Report and Order of the Commission. Moreover, the petition presented no facts or arguments bearing directly or indirectly on the meaning of the words "to the site of Bolling Field". The contention of petitioners therein was that Appellant should be required to confine its operations to transportation of shipments which were consigned to the military authorities at Bolling Field.

Upon learning of Appellant's operation here under consideration, the Commission had two lawful courses open to it. One was the institution of an investigation into the lawfulness of the operations conducted by Appellant pursuant to its certificate of public convenience and necessity, and the second was the institution of a proceeding under the provisions of Section 212 (a) of the Act (49 U.S.C. 312 (a) to revise the certificate issued to Appellant in MC-106965 Sub 15). Either of these procedures undoubtedly would have resulted in a public hearing and the issuance of an Order, upon which, if unfavorable to Appellant, an appeal to the Courts could have been based. The Commission, however, elected to follow neither of these courses, but instead to reconsider the proceeding upon its present record and to issue a Report without an accompanying Order announcing its conclusions. The Appellant therefore was without adequate administrative relief and clearly without recourse to the Courts.

The question before the Court in interpreting Appellant's certificate in MC-106965 Sub 15 was a factual one as to what constitutes the geographic boundaries of Bolling Field. As we have stated under the prior heading, it is our opinion that the determination of the meaning of the term "to the site of" does not involve a technical interpretation requiring the expert knowledge of the Commission, but, to the contrary, may be made as well by the Courts as by the Commission upon the basis of facts such as those contained in the Stipulation now before this

Court. (Jt. App. 57A) The Commission, however, in issuing its Report had no evidence before it as to where the site of Bolling Field begins and the outside streets and highways bordering the military reservation terminate and afforded the Appellant no opportunity to present these facts. All the statements of fact in the Report were self serving statements of the Commission not based upon any evidence of record. It arbitrarily assumes in the Report that "the site of Bolling Field" encompasses only that portion of the military reservation within a fenced enclosure. The facts now before the Court, however, show that the military authorities use land on both sides of South Capitol Street, and the District of Columbia has jurisdiction over Portland Street to a point inside the fenced enclosure (See Stipulation). If the Commission had considered the above facts as well as those which could have been adduced at a hearing, it might well have altered the conclusions reached in its report. The failure, however, of the Commission to give consideration to facts which pertained directly to the question in issue and which were reasonably available to it leaves this Court with no alternative but to conclude that the Report was arbitrarily issued.

The principles applicable to the construction of the words "to the site of Bolling Field," are the same as those applied by the court in *Republic Oil Refining Co. v. Granger*, 198 F. 2d 161, wherein the words "within the premises of a refinery" were construed. The court held that transportation of oil by pipe line over a strip of land extending approximately one-half mile from the tract actually occupied by the refinery was a movement within the premises of the refinery. The refinery had a right of way in and over the strip of land and the pipe line was used to move petroleum and liquid products thereof between storage tanks and tankers. The court said:

"Specifically, we think the phrase 'premises of a refinery' was used to designate and comprehend what-

ever property and area might reasonably be connoted by or described by or described in terms of a particular localized industrial operation. Only in the unusual case such as we have here is the extent of the refinery premises hard to determine. But in any event, what is reasonably described as the refinery premises or the 'premises of a refinery'—to us the use of 'refinery' is simply adjectival and descriptive, and the phrases seen equivalent and interchangeable—is essentially a question of fact to be decided in all the circumstances of the particular case."

Turning now to the actual conclusions reached by the Commission upon the basis of the record before it, we contend that the Commission's interpretation of the term "the site of" is wholly unreasonable and contrary to a prior Commission and Court Decision interpreting a similar term. As stated above, the Commission appears to have arbitrarily assumed from the first that the term "the site of Bolling Field" encompasses only that portion of the military reservation within a fenced enclosure, for in stating the question before it, the Commission asked "whether or not the term 'the site' . . . confers the right to serve outside streets or highways bordering the *military reservation*". (Italics added) This question in our opinion begged the basic issue before the Commission, which was the determination or definition of what was the confines of the military reservation. Appellant has never contended nor is it here contending that it can serve points outside the military reservation of Bolling Field under its certificate in MC-106965 Sub 15, but we do vigorously contend as is discussed under the following heading that certain roads located outside of the fenced enclosure are a part of the military reservation. For the Commission to pose the question—Can appellant serve points outside the military reservations?—the answer to which is self evident, destroys any possible logic to the conclusions which follow.

The Commission defined the word "site" as meaning "plot of ground suitable or set apart for some specific use and occupied for that purpose." It must be recognized that this definition is very restrictive. The word "site" is a derivation of the word "seat". The term "courthouse site" has been construed to mean the same as "county seat" and are taken and understood to signify the seat of government of the county, and in this sense are not restricted and confined to the particular lot or the ground by measurement upon which the necessary public buildings are erected. *Matkin v. Marengo County*, 34 So. 171, 174; 137 Ala. 155. Accepting, however, for the purpose of this further argument the Commission's definition of the term "site", it does not follow that ground set apart for a specific use must be determined by reference to a fenced enclosure and gate, or that no portion of a reservation which is located outside of the fenced enclosure can properly be considered as part of the area set aside for a specific use. The fences and gates at Bolling Field are intended primarily for security purposes, but a portion of the area outside the fences and gates, primarily the apron and roads leading up to the gate, are designed to serve a specific purpose, namely the checking of security passes and the dispensing of information. Why this area then would not be considered as much a part of the reservation as that located inside the fences is hard to imagine.

There are many reasons why the military officers who control all operations within Bolling Field might prohibit the operation of a motor tank truck within the fenced enclosure for any purpose and operations of a vehicle beyond the gate would not be necessary to effect delivery to the field. If a pipe leading to storage tanks within the field was extended to the fence, deliveries of petroleum products could be made without any movement of the motor vehicle within the field. Many deliveries of petro-

leum products are made in this manner from tank vehicles which do not leave the public highway, and the Commission was aware of this fact when it granted authority only to the site of the military reservation. If we accept the construction of the certificate now urged by the Commission the appellant would have no authority to deliver a shipment to Bolling Field by unloading the product into a pipe at the fence. Moreover, Appellant's use of such certificate in combination with its other certificates would depend upon the caprice of the military officials in allowing Appellant ingress to Bolling Field. The Commission has been delegated by Congress the duty to regulate the motor carrier industry, yet the military authorities could control Appellant's operations by allowing or denying ingress to Bolling Field.

The words "to the site of" are plain and unambiguous. The Commission has found that it should give full application to the plain terms of a certificate. See *Coastal Tank Lines, Inc. v. Charlton Bros. Transportation Co., Inc.*, 48 MCC 289, 302. If it had been the intent of the Commission to authorize service only to some place within the military reservation known as Bolling Field, it appears logical that it would have specified such service in the certificate. In *Garrett Freight Lines, Inc. Ext. Yellowstone Nat'l. Park* 49 M.C.C. 631, the Commission granted a carrier authority to serve points "in Yellowstone National Park". The carrier had authority to serve West Yellowstone which is a gateway to the park.

Stronger and conclusive proof of the meaning of the words "to the site" is the interpretation given thereto by the Commission and a United States District Court prior to the decision of the Commission in the case in which Appellant was granted its authority. The Commission in *Missouri Pac. Transportation Co. Extension—Fort Leavenworth*, 41 M.C.C. 545, granted a motor common carrier of passengers a certificate of public convenience and nec-

essity which authorized service from and to Fort Leavenworth, Kans. A competing motor carrier which for many years had enjoyed the exclusive right to operate within the military reservation protested against the issuance of the authority. One of its arguments on exceptions was that the authority recommended to be granted by the Examiner "serving Fort Leavenworth in off route service" is indefinite since the scope of applicant's operations within the military reservation is not clearly set forth. In answer to this contention the Commission stated as follows:

"Authority to serve the military reservation in off-route service does not prohibit applicant from serving any point in such reservation which is not reached by a public highway. Neither does such authority grant applicant an indisputable right to serve any particular point in such reservation. Applicant apparently has had no difficulty with the local authorities at Fort Leavenworth in connection with its operations conducted pursuant to the temporary authority, and none is anticipated if similar permanent authority is granted. The circumstances which control the route to be followed and terminals within the reservation are local problems which properly may be left to the managerial direction of applicant, and the regulation of local authorities. The extent to which applicant may operate within the military reservation beyond the entrance via Kansas Highway 92 is a matter which may be determined by applicant and the military officials of the reservation."

The United States District Court, District of Delaware, *Kansas City v. Leavenworth Transportation Co. v. United States et al*, 51 F. Supp. 916, affirmed the decision of the Commission, and in doing so, the Court said:

"The Commission has not attempted to grant authority to service the post exchange or any other point inside the Fort. Permission is simply to the site of the Fort. The military authorities may deny Missouri Pacific the right to enter the Fort; or they

may grant a permit to service inside the Fort and up to the post exchange."

This use of the word "to the site" to indicate that authority to operate to a military reservation granted no authority to operate within such reservation occurred in 1943 and the Commission and Appellant were aware of such decision when the report of the Commission granted Appellant authority to operate "to the site of Bolling Field": Appellant accepted the authorized certificate of public convenience and necessity in the light of such decision. While we recognize that the decision of the District Court referred to above has not the technical effect of a previous adjudication, it should be considered conclusive upon the Commission as to interpretation there made by the Court. *I. C. C. v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824 affirming 108 Fed. 249 and 98 Fed. 173.

A certificate of public convenience and necessity is a public contract. The holder of such certificate undertakes to serve the public indiscriminately to the extent of its ability and within the scope of the certificate, and the Government guarantees the continuance of the privilege as long as the holder observes all conditions and requirements of the certificate. In construing such certificate, the Court should consider acts of interpretation by the holder of the certificate as well as acts of interpretation by the regulatory body issuing the certificate. See *White Star Bus Lines, Inc. v. People*, 75 F. 2d 889.

In summary, we submit that the Commission's Report relied upon by the lower Court is arbitrary and capricious for the following reasons: (1) the reopening of the proceeding in No. MC-106965 Sub 15 for reconsideration was an improper method of interpreting Appellant's certificate; (2) the Commission failed and refused to consider facts bearing directly on the question of the meaning of the term "the site of Bolling Field" as used in Appel-

lant's certificate; (3) the interpretation given to the term by the Commission was illogical and contrary to its plain meaning and (4) the interpretation is contrary to the construction given to the term by the Commission and the Court in a prior case.

3. Appellant Has Operated Its Vehicles Through the Site of Bolling Field.

The judgment of the lower court is based on the assumption that Appellant has not operated its motor vehicles through the site of Bolling Field. We believe this is an erroneous finding of fact. All of the land now occupied by the improved highway known as South Capitol Street for the full length parallel to Bolling Field and land on each side of that highway is owned by the United States Government. The War Department transferred to the Commissioners for the District of Columbia jurisdiction only over a strip 74 feet in width. When a vehicle leaves that strip it is on a part of the land which is under the jurisdiction of the United States Air Force. (See Stipulation)

The undisputed facts in this case are that Appellant operates its vehicles over the side road leading from South Capitol street to the gates of the military enclosure. The operation of Appellant in the delivery of a shipment to Bolling Field would be complete and clearly within its operating authority if it made delivery of its product at this point. This being true, there is no sound reason for a requirement that Appellant operate its vehicles to some place beyond the gate.

If Appellant may make a delivery to Bolling Field by stopping its vehicle at the gate, it may tack its operating authorities at that point. It is a rule of statutory construction that a statute should be so construed as to be applicable under all conditions and factual situations.

Stephan v. Commissioner of Internal Revenue, 197 F. 2d 712. Furthermore, the law never requires a person to do an idle thing. When appellant has operated its vehicle to the gate of Bolling Field, it has done all that the law requires.

The decisions of the three judge statutory court in *Kansas City and Leavenworth Transp. Co. v. U. S.*, supra, involved the transportation of passengers but there is no material difference in the pick up or discharge of passengers at the entrance to a military reservation and the pickup or delivery of a freight shipment at such entrance. If Appellant was transporting packaged freight, it would be in strict compliance with its operating authority if it delivered a package to an attendant at the entrance to the field and would actually be performing transportation from Bolling Field if it received a shipment from an attendant at such entrance. The mere fact that for the convenience of the military authorities appellant operates its vehicles to a storage tank some distance beyond the gate does not change the scope of Appellant's operating authority.

One purveyor of fuel oil may deliver fuel oil to a private residence by stopping the vehicle on a public street or highway and extending a hose to the receiving pipe. Another may operate the vehicle onto the private driveway adjacent to the house. Both have operated to the residential site.

Section 206 (a) of the act authorizes the Commission to issue a certificate authorizing operations "within any reservation under the exclusive jurisdiction of the United States" and, pursuant to such authority, it could have specified in the certificate that shipments transported thereunder must be delivered to some specified place within the reservation. It did not do so and it may not do so at this time by an arbitrary interpretation of a certificate that is plain and unambiguous.

The Commission in *Alexander, B.&W. Transit Co. Ext. Washington Airport*, 30 M.C.C. 618, decided September 30, 1941, found that it was empowered by the provision of Section 206 (a) to regulate motor carrier operations over highways within a reservation to the same extent that it may regulate transportation over other public highways. This construction of the Act has been impliedly sanctioned by subsequent reenactments without alteration and must be accepted by the Commission and the courts as a part of the substantive law. *New York, N. H. & H. R. Co. v. I. C. C.*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272. Since the Commission could have granted appellant specific authority to operate over Portland Street to places within the military enclosure, its granting of authority only to the site of Bolling Field is a clear intention not to limit the service to transportation of shipments beyond the entrance to the field.

Appellant's operating authority to points in Maryland, Virginia and West Virginia is applicable from any place within the District of Columbia. Operation pursuant to such authority may begin wherever operation to Bolling Field terminates. The tacking of the two operating authorities is as complete when made at the entrance to Bolling Field as it is when made at any place beyond the gate. Presumably the Commission was aware of this fact and drafted the certificate in a manner that would permit Appellant to combine its operating authorities without interference of the military authorities in control of Bolling Field.

In a case before the United States Emergency Court of Appeals, *Borelli v. Reconstruction Finance Corp.*, 196 F. 2d 730, decided April 10, 1952, the question was whether a previously established policy of construing the term "unaffiliated slaughterer" to mean the status of the applicant at the time of the filing an application for subsidy pay-

ments was binding on the Reconstruction Finance Corporation. The Court held that such construction was controlling, and said:

"In construing a regulation, where there is doubt as to its meaning, the rule is the same as that involving interpretation of statutes, and there may be considered the previously established policy, the policy designed to be promoted, and the spirit of the regulation, as well as its contemporaneous and practical construction. *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 L. Ed. 1018; *United States v. Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 1071; *Fleischmann Construction Co. v. United States*, 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624; *White v. Winchester Country Club*, 315 U. S. 32, 62 S. Ct. 425, 86 L. Ed. 619."

The same rule of construction is applicable in the instant case; and it must be presumed that the Commission, when it granted Appellant authority to the site of Bolling Field, was thoroughly conversant with its construction of such authority in prior cases and with the judicial construction placed thereon. *Barringer v. Mille*, 77 A 2d 895, 6 N.J. 139, *New York N. H. & H. R. Co. v. I. C. C.* 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

CONCLUSIONS

Appellant respectfully requests the Court to find:

1. That the lower court erred in holding that the certificate of public convenience and necessity issued to Appellant by the Interstate Commission authorizing operation by Appellant to the site of Bolling Field required Appellant to operate only into the fenced enclosure of the military reservation.
2. That the lower Court erred in holding that operation by Appellant of its motor vehicles to and from the entrance gate of Bolling Field was a violation of its operating authorities.

3. That the plaintiff interveners (appellees herein) failed to prove that Appellant was conducting motor carrier operations that were in any respect in violation of its certificates of public convenience and necessity.

4. That the decision of the lower court should be reversed and the complaint dismissed.

Appellant prays that the decision of the lower court be reversed and that the complaint be dismissed.

Respectfully submitted,

RALPH E. CURTISS

CLARENCE D. TODD

DALE C. DILLON

Attorneys for Appellant

October 31, 1952

APPENDIX

INDEX

	PAGE
Complaint for Injunction.....	2 A
“Exhibit A”	9 A
Report of the Commission on Reconsideration Division 5, Commissioners Lee, Rogers, and Patterson	10 A
Answer	15 A
General Answer	18 A
Exhibit A	20 A
Petition of Applicant for Reconsideration.....	21 A
Report of the Commission.....	29 A
Order	39 A
Plaintiff’s Request for Admission of Facts Under Rule 36	41 A
Reply of Defendant to Plaintiff’s Request for Ad- mission of Facts Under Rule 36.....	45 A
Order	48 A
Motion of Coastal Tank Lines, Inc., E. Brooke Mat- lack, Inc., and Leaman Transportation Corpo- ration to intervene as plaintiffs.....	49 A
Order Granting Intervention.....	50 A
Motion by Plaintiff for Summary Judgment.....	51 A
Plaintiff’s Supplemental Request for Admission of Facts Under Rule 36.....	52 A
Report of the Commission.....	53 A
Reply of Defendant to Plaintiff’s Supplemental Request for Admission of Facts Under Rule 36	56 A
Stipulation	57 A
Judgment of Permanent Injunction.....	58 A

	PAGE
Reply of Defendant to Motion by Plaintiff for Summary Judgment and Affidavit in Opposition Thereto	60 A
Affidavit of Frank L. Grimm.....	61 A
Motion by Defendant for Summary Judgment.....	62 A
Memorandum of Points and Authorities in Support of Motion for Summary Judgment in Favor of Defendant	64 A
and	
In Opposition to Motion for Summary Judgement in Favor of Plaintiff.....	64 A

1 A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,535

M. I. O'BOYLE & SONS, INC.,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC.,
E. BROOKE MATLACK, INC., and
LEAMAN TRANSPORTATION CORPORATION,

Appellees.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Sep 25 1951 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
INTERSTATE COMMERCE COMMISSION.

Plaintiff

vs.

M. I. O'BOYLE & SON, INCORPORATED,
DOING BUSINESS AS O'BOYLE TANK LINES,
Defendant

Civil Action No. 4027—51

Complaint for Injunction

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and for its Complaint against the above-named defendant alleges:

I.

This suit is brought and the jurisdiction of this Court is invoked under the provisions of Sections 204(a)(6) and 222(b) of the Interstate Commerce Act (49 U. S. C., 304(a)(6) and 322(b)), and under the general laws and rules relating to suits in equity arising under the Constitution and laws of the United States.

II.

The defendant, M. I. O'Boyle & Son, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is engaged in the business of transporting property by motor vehicle under the trade name of O'Boyle Tank Lines, with its principal office at 817 Michigan Avenue, N. E., in the City of Washington, District of Columbia, within the jurisdiction of this Court.

III.

At all times herein mentioned, up to and including the date of filing this complaint, the defendant was and is engaged in the transportation of property, including petroleum products in bulk, in tank trucks, in interstate commerce by motor vehicle on public highways over certain regular and irregular routes from, to, and between certain points and territory in the States of New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, and the District of Columbia, for compensation, pursuant to various certificates of public convenience and necessity and temporary operating authorities issued to the defendant by the Interstate Commerce Commission, and the defendant was and is a common carrier of property by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act and to the rules, regulations, requirements, and orders of said Commission made and promulgated pursuant thereto.

IV.

Among the various operating rights granted to the defendant by the Commission as described in Paragraph III of this complaint was and is the following operating right contained in certificate of public convenience and necessity issued on May 19, 1947, pursuant to an application filed by the defendant in the Commission's Docket No. MC-106965, authorizing the transportation by the defendant of:

Petroleum products in bulk, in tank trucks, over irregular routes,

• • • •

From points and places in the Washington Commercial Zone as defined by the Commission in the Washington, D. C., Commercial Zone, 3 M.C.C. 243, to Martinsburg and Shepherdstown, W. Va., points and places in

Maryland, and those in that part of Virginia on and north of U. S. Highway 60 except those in Accomac and Northampton Counties.

3

V.

One of the authorized origin points in the said Washington, D. C., Commercial Zone from which the defendant was and is authorized to transport petroleum products in bulk, in tank trucks, pursuant to the operating right referred to in Paragraph IV of this complaint, was and is Bolling Field in the City of Washington, D. C., the said field being a military enclosure under the exclusive jurisdiction of the United States Air Force.

VI.

Another of the various operating rights granted to the defendant by the Commission as described in Paragraph III of this complaint was and is the following operating right contained in the certificate of public convenience and necessity issued on January 23, 1950, pursuant to an application filed by the defendant in the Commission's Docket No. MC-106965 Sub 15, authorizing the transportation of:

Petroleum products in bulk, in tank vehicles, over irregular routes,

From points and places in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union and Middlesex Counties, N. J., to the site of Bolling Field, In Washington, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience only, with no transportation for compensation on return except as otherwise authorized.

5 A

VII.

Pursuant to an order of the Commission dated July 24, 1950, the proceeding in the Commission's Docket No. MC-106965 Sub 15 aforesaid was reopened for reconsideration on the record then existing before the Commission, and on October 10, 1950, Division 5 of the Commission issued its report of the Commission on such reconsideration, entitled M. I. O'Boyle & Son, Inc., Interpretation of Certificate, which report was published in 52 M.C.C. 248, and a copy of which is attached hereto, made a part hereof, and marked "Exhibit A".

4

VIII.

On November 8, 1950, the defendant filed a petition with the Commission, seeking reconsideration by the entire Interstate Commerce Commission of the report of Division 5 of October 10, 1950, aforesaid.

IX.

On March 5, 1951, the entire Interstate Commerce Commission issued an order denying the petition by the defendant for reconsideration of the report of Division 5 of October 10, 1950, aforesaid, the Commission stating as the reason for denial thereof "that it does not set forth sufficient grounds to warrant any change in the findings of Division 5."

X.

Pursuant to the requirements of the findings in the report of Division 5 of October 10, 1950, aforesaid, as confirmed by the order of the entire Commission of March 5, 1951, aforesaid, the defendant was and is permitted to combine or tack the operating authorities described in Paragraphs IV and VI of this complaint only

by operating through the site of Bolling Field, Washington, D. C., as a gateway.

XI.

During the period from January 23, 1950, the date of the issuance of the certificate to the defendant described in Paragraph VI of this complaint, to the date of the filing hereof, the defendant transported a large number of shipments of petroleum products in bulk, in tank trucks, in interstate commerce by motor vehicle, for compensation, over and upon the public highways from origin points located in the Counties of Delaware and Philadelphia in Pennsylvania, and in the Counties of Bergen, Essex, Gloucester, Camden, Hudson, Union and Middlesex in New Jersey, to various destination points located in the State of Maryland, including Patuxent River,
5 Indian Head, Hancock, Rockville, and Baltimore, Maryland, and to various destination points located in that part of Virginia on and north of U. S. Highway 60, including Winchester, Fort Belvoir, Quantico, Dahlgren, Richmond, and Norfolk, Virginia.

XII.

At the times said shipments of property described in Paragraph XI of this complaint were transported by the defendant, the defendant did not and does not operate its motor vehicles through the site of Bolling Field in Washington, District of Columbia, as a gateway.

XIII.

At the times said shipments of property as described in Paragraph XI of this complaint were transported by the defendant, there was not in force and there is not now in force with respect to the defendant a certificate of public convenience and necessity or other operating authority issued by the plaintiff Commission authorizing

7 A

transportation of petroleum products in bulk, in tank trucks, over irregular routes, in interstate commerce for compensation, from the origin points in Pennsylvania and New Jersey mentioned in Paragraph VI of this complaint to the destination points in West Virginia, Maryland, and Virginia mentioned in Paragraph IV of this complaint, without such operations being conducted by the defendant through the site of Bolling Field in Washington, District of Columbia, as a gateway.

XIV.

The plaintiff is informed and believes and therefore alleges that unless enjoined and restrained by this Court, it is the intention of the defendant in manner and form aforesaid, or otherwise, to continue to transport property by motor vehicle in interstate commerce for compensation over the public highways from the said origin points in Pennsylvania and New Jersey to the said destination points in West Virginia, Maryland, and Virginia, without such operations being conducted by the defendant through the site of Bolling Field in Washington, District of Columbia, as a gateway.

XV.

The said unauthorized acts and operations by the defendant are in violation of the provisions of Section 206(a) of the Interstate Commerce Act (49 U. S. Code 306(a)), and, as such, are subject to be enjoined and restrained by this Court on the application and suit of the plaintiff Commission under the express provisions of the Interstate Commerce Act, and more particularly of Section 222(b) thereof (49 U. S. Code 322(b)).

WHEREFORE, plaintiff demands judgment as follows:

(A) That the defendant, M. I. O'Boyle & Son, Incorporated, doing business as O'Boyle Tank Lines, its offi-

cers, agents, servants, employees, and attorneys, and all others acting by or under its direction or authority, and all persons, firms, companies, and corporations and their respective officers, agents, servants, employees, and attorneys in active concert or participation with it, be perpetually and permanently enjoined and restrained from in any manner or by any device, directly or indirectly, transporting petroleum products in bulk, in tank trucks, by motor vehicle in interstate commerce for compensation over irregular routes on public highways from any origin point or points located in the Counties of Delaware or Philadelphia in Pennsylvania or in the Counties of Bergen, Essex, Gloucester, Camden, Hudson, Union, or Middlesex in New Jersey to any destination point or points of Martinsburg or Shepherdstown in West Virginia, any point or place in Maryland, or those in that part of Virginia on and north of U. S. Highway 60

7 except those in Accomac and Northampton Counties in Virginia, without the defendant performing operations in the course of such transportation from said origin point or points to said destination point or points through the site of Bolling Field in Washington, District of Columbia, or unless and until such time, if at all, as there is in force with respect to the defendant a certificate of public convenience and necessity or other appropriate operating authority issued by the Interstate Commerce Commission authorizing such transportation from said origin point or points to said destination point or points without the requirement that the defendant traverse said Bolling Field in the course of such transportation;

(B) That a preliminary injunction be issued herein enjoining and restricting the defendant, M. I. O'Boyle & Son, Incorporated, doing business as O'Boyle Tank Lines, from doing any of the acts and things set forth in Paragraph (A) of this demand for judgment during the pendency of this action; and

(C) That the plaintiff have such other and further relief in the premises as justice and equity may require, with its costs in this behalf incurred.

/s/ George Morris Fay
George Morris Fay
United States Attorney

/s/ Ross O'Donoghue
Ross O'Donoghue
Assistant United States Attorney

/s/ Jerome Powell
Jerome Powell
Assistant United States Attorney

/s/ James Y. Piper
James Y. Piper
Attorney, Bureau of Motor
Carriers
Interstate Commerce
Commission

8 Filed Sep 25 1951 Harry M. Hull, Clerk

• • • •

"Exhibit A"

9 No. MC-106965 (Sub-No. 15)
M. I. O'BOYLE & SON, INC.,
INTERPRETATION OF CERTIFICATE

Decided October 10, 1950

Found that applicant may combine or tack the authority granted herein in certificate No. MC-106965 (Sub-No. 15) and that in certificate No. MC-106965, provided that oper-

ations thereunder are performed through the site of Bolling Field, Washington, D. C., as a gateway. Proceeding closed.

Appearances as shown in prior report.

Report of the Commission on Reconsideration
Division 5, Commissioners Lee, Rogers, and Patterson
 By Division 5:

In the prior report herein,—decided November 1, 1949, we found that public convenience and necessity required operation by applicant, M. I. O'Boyle & Son, Inc., of Washington, D. C., in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex Counties, N. J., to the site of Bolling Field, in Washington, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience. The application was denied in all other respects.

On January 23, 1950, a certificate was issued to applicant authorizing the performance of the above-described operation. Thereafter, upon consideration of the record, of a joint petition by certain interveners and of applicant's motion to dismiss the petition, by order of July 24, 1950, we reopened the instant proceeding for reconsideration on the present record and overruled the said motion.

In their petition interveners point out that the Commission, division 2, suspended¹ proposed through
 10 rates published by applicant on petroleum products from certain points in the Pennsylvania and New

¹ These rates were suspended by order of April 26, 1950, in Investigation and Suspension No. M-3336, Petroleum Products Over O'Boyle Tank Lines, hereinafter called the suspension proceeding, and a hearing was held on June 8, 1950. Briefs were filed therein and the matter is now pending.

11 A

Jersey counties specified above to certain points in Maryland and Virginia, and contend that applicant has no authority to operate directly from these origins to the Maryland and Virginia points specified in the published tariff. Applicant holds a certificate in MC-106965 which authorizes, insofar as here material, operations in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank trucks, from points in the Washington, D. C., commercial zone, as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243 and 48 M. C. C. 460, to points in Maryland and a specified portion of Virginia. Bolling Field is located within the Washington commercial zone, but Andrews Field is not so located. See Washington, D. C., Commercial Zone, *supra*, p. 464. The real question presented is whether applicant, by "tacking" its authority in MC-106965 as described above with that granted in this proceeding, can render service from the described New Jersey and Pennsylvania origins to points in Maryland and the specified portion of Virginia.

Intervenors contend that such tacking is not permissible. They urge that a gateway used in tacking must be a point where freight may be stored and distributed, or from which freight may be shipped or reshipped by the public generally in its dealings with a carrier. They claim that airfields such as Bolling and Andrews Fields are not places of sale or exchange of products for re-shipment, nor places of interchange of products, shipments, or equipment. They assert that any authority granted to applicant in this proceeding should be limited to shipments moving on Government bills of lading, and that such authority should be restricted to prevent applicant from originating shipments at Bolling and Andrews Fields or from beginning transportation at those points. Intervenors also point to the fact that they withdrew their opposition to that part of the application seeking

authority to serve Bolling and Andrews Fields provided the operating rights granted to applicant were restricted to permit only the transportation of shipments moving on Government bills of lading and provided the commodity description was limited to the petroleum products actually used by the Army Air Force at these two fields.

The certificate now held by applicant in this proceeding was not obtained by fraud or misrepresentation but rather was duly issued in accordance with the provisions of the Interstate Commerce Act. Any diminution or revocation now of the operating rights evidenced by this certificate is prevented unless the procedure set forth in section 212 (a) of the act is followed or unless requested
 11 by the holder of that certificate. This we shall proceed to interpret and determine the scope of the operating rights which are in fact granted in the certificate now held by applicant.

The right of a motor common carrier to tack "separate" grants of unrestricted authorities is well-settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both. The essential requirements in such instances are (1) that there must be a "point of service" common to both operating authorities, (2) the physical operation actually must be rendered "through" such common point, and (3) the character of the authorized service (either regular- or irregular-route) must be preserved.

The irregular-route authorities which applicant proposes to combine are separate grants, each unrestricted against tacking. However, to combine these authorities each must be such as would permit interchange at a point common to both such authorities if the rights were in separate hands. *Valley Motor Lines, Inc., v. Western Trunk Lines*, 47 M. C. C. 718. In view of the fact that Andrews Field is not located within the Washington

commercial zone, we need not further consider the right of applicant to use that point as a gateway.

We do not agree with interveners that a gateway used in tacking must be a point where freight may be stored and distributed, or from which freight may be shipped or reshipped by the public generally in its dealings with a carrier. The fact that Bolling Field is a military reservation and operations within its boundaries are governed by the officials thereof does not require that we give different consideration to the tacking or combining of routes than if the field was not a military reservation. We have so said in a number of cases. For example, in *Alexander, B. & W. Transit Co., Ext.—Washington Airport*, 30 M. C. C. 618, at page 620 we stated:

In our opinion, the National Airport at Gravelly Point is such an intermediate point. We think that applicant, under its present authority, may lawfully operate over the airport roads to and from the airport buildings. Such operations would be no different, insofar as regulation under the act is concerned, from operations by applicant over the highways and streets of Alexandria, another intermediate point on the same route. Applicant's right to operate over any public highway or street within the municipal limits of Alexandria, subject to all lawful regulations of that city, could not well be questioned by anyone. The same rule should govern in the case of operations within the boundaries of the airport. Applicant's expressed intention to abide by the terms and conditions of any contract which it may enter into with the Administrator of the airport indicates that it is aware of the fact that in the conduct of operations over the airport roads it must comply with all lawful requirements of the Administrator.

12 Similarly, in *Missouri Pac. Transp. Co. Extension—Fort Leavenworth*, 41 M. C. C. 545, at page 547, division 5, said:

Authority to serve the military reservation in off-route service does not prohibit applicant from serving any point in such reservation which is not reached by a public highway. Neither does such authority grant applicant an indisputable right to serve any particular point in such reservation. Applicant apparently has had no difficulty with the local authorities at Fort Leavenworth in connection with its operations conducted pursuant to the temporary authority, and none is anticipated if similar permanent authority is granted. The circumstances which control the route to be followed and terminals within the reservation are local problems which properly may be left to the managerial direction of applicant, and the regulation of local authorities. The extent to which applicant may operate within the military reservation beyond the entrance via Kansas Highway 92 is a matter which may be determined by applicant and the military officials of the reservation.

It is clear that applicant has the right to serve Bolling Field and that right includes the right to interchange shipments at the field with other carriers so authorized. It follows therefrom that applicant may also combine or tack two separate authorities which include the right to serve the field, subject to the approval by the governing military officials of physical operation through Bolling Field.

There remains for consideration here the question as to whether or not the term "the site of" as contained in applicant's certificate No. MC-106965 (Sub-No. 15) confers the right to serve outside streets or highways bordering the military reservation, enabling applicant to combine or tack the authorities involved by operating over those streets or highways without actual operations within the field. A site is a plot of ground suitable or set apart for some specific use, and occupied for that purpose. As used in the certificate the term includes

only those grounds within the military reservation and does not include adjacent streets, areas, or land in the vicinity. We conclude, therefore, that the highways or streets leading to the gate or adjoining the outer boundary of the military reservation are not authorized points of service which can be said to be points of service common to both authorities and that accordingly the two authorities may not be combined or tacked by any theoretical interchange at any point on any such highway or street. We conclude further that applicant may combine or tack the referred-to authorities in the manner hereinbefore discussed, provided that the actual operations conducted thereunder include a physical operation through Bolling Field. If the military officials in charge of the field prohibit such a physical operation, thus preventing applicant from meeting the above-described condition, it may not combine or tack the involved authorities.

13 We find that applicant may combine or tack the authority granted herein in certificate No. MC-106965 (Sub-No. 15) and that in certificate No. MC-106965, only by operating through the site of Bolling Field, Washington, D. C., as a gateway.

No further order is necessary, and the proceeding which was reopened for consideration of the petition for interpretation is hereby closed.

52 M.C.C.

• • • •

15 Filed Oct 5 1951 Harry M. Hull, Clerk

Answer

Comes now the defendant, M. I. O'Boyle & Son, Inc., and for its answer to the complaint of the Interstate Commerce Commission in Civil Action No. 4027-51, alleges and states:

I.

Defendant neither admits nor denies the allegations of Paragraph I of the Complaint but verily believes that no provision of Section 204(a) (6) of the Interstate Commerce Act (49 U.S.C. 304(a) (b) is involved in this proceeding.

II.

Defendant admits the allegations of Paragraph II of the Complaint, except that the name of defendant is incorrectly stated. The correct name of defendant is M. I. O'Boyle & Son, Inc.

III.

Defendant admits the allegations in Paragraph III of the Complaint, except that defendant does not engage in the transportation of petroleum products, in bulk, in tank trucks, in interstate commerce by motor vehicle from or to any point in the State of New York.

IV.

Defendant admits the allegations of Paragraph IV of the Complaint.

V.

Defendant admits that Bolling Field is in the City of Washington, in the District of Columbia, as alleged in Paragraph V, but denies that said Bolling Field is a "military enclosure" under the exclusive jurisdiction of the United States Air Force.

VI.

Defendant admits the allegations in Paragraph VI of the Complaint.

VII.

Defendant admits the allegations in Paragraph VII of the Complaint.

VIII.

Defendant admits the allegations in Paragraph VIII of the Complaint and attaches hereto and makes a part hereof a copy of the Petition for Reconsideration filed with the Interstate Commerce Commission by this defendant on November 8, 1950, marked Exhibit A.

IX.

Defendant admits the allegations in Paragraph IX of the Complaint.

X.

Defendant denies the allegations in Paragraph X of the Complaint. Defendant alleges that the only Order entered in Interstate Commerce Commission Docket No. MC-106965 Sub 15, was the Report and Order of Division 5, decided November 1, 1949, a copy of which is attached hereto, made a part hereof, and is marked Exhibit B. Defendant further alleges that pursuant to said Order of November 1, 1949 there was issued to it a certificate of public convenience and necessity on the 23rd day of January, 1950 and that a copy of said certificate of public convenience and necessity is attached hereto, made a part hereof and marked Exhibit C. Defendant further denies that there is any Order of the Interstate Commerce Commission, or any rule or regulation promulgated by the Interstate Commerce Commission, which requires this defendant in the conduct of the operations authorized in the certificate of public convenience and necessity, hereinabove referred to, to operate through the site of Bolling Field, Washington, D. C., as a gateway.

XI.

Defendant admits the allegations contained in Paragraph XI of the Complaint.

XII.

Defendant denies the allegations contained in Paragraph XII of the Complaint.

17

XIII.

Defendant denies the allegations in Paragraph XIII of the Complaint.

XIV.

Defendant denies the allegations in Paragraph XIV of the Complaint. Defendant denies that at any time it has conducted operations which were not strictly in accordance with the orders of the Interstate Commerce Commission and with all rules and regulations promulgated by the Interstate Commerce Commission pursuant to authority vested in it by the Interstate Commerce Act.

XV.

Defendant denies the allegations contained in Paragraph XV of the Complaint.

General Answer

Defendant, for further answer to said Complaint, alleges and states that it was issued a certificate of public convenience and necessity authorizing its operations as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points and places in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union and Middlesex Counties, N. J., to the site of Bolling Field, in Washing-

ton, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience only, with no transportation for compensation on return, except as otherwise authorized; that said certificate of public convenience and necessity did not specify the manner of operation, but that the meaning of the term "to the site" had been determined in a prior proceeding, to wit: in Missouri-Pacific Transportation Co. Extension—Fort Leavenworth, 41 M.C.C. 545; that such authority was found to grant authority only to the entrance to the military reservation which interpretation was sustained by the United States District Court for the District of Delaware in Kansas City & Leavenworth Transportation Co. vs. United States of America, Interstate Commerce, and Missouri-Pacific Transportation Co., 51 F. Supp. 916. (See Exhibit A attached hereto) Defendant further alleges that at all times its operations to the site of Bolling Field, in Washington, in the District of Columbia, have been in accordance with the interpretation of the term "to the site" as established by the Commission and by the U. S. District Court for the District of Delaware.

18 Defendant further alleges that the transportation which it is performing in the transportation of petroleum products, in bulk, in tank vehicles, by a combination of the operating authorities described in Paragraphs IV and VI of the Complaint are lawful in every respect; that a substantial portion thereof consists of the transportation of aviation fuels for the United States government to military installations in Maryland, and Virginia; and that the discontinuance of such operation will impair the conduct of current operations at such military installations.

Defendant further alleges that an injunction issued by this Court, enjoining and restrainnig this defendant from doing any of the acts and things set forth in Paragraph

A of the prayer to the Complaint, will result in the taking of the property of this defendant without due process of law, and will cause irreparable injury to defendant.

WHEREFORE, defendant, having fully answered, respectfully prays the Court that the Complaint be denied.

/s/ Ralph E. Curtiss
Ralph E. Curtiss

/s/ Clarence D. Todd
Clarence D. Todd

/s/ Dale C. Dillon
Dale C. Dillon

Room 944,
Washington Building
Washington 5, D. C.
Attorneys for Defendant

TODD, DILLON & CURTISS
944 Washington Building
Washington 5, D. C.

20 Filed Oct 5 1951 Harry M. Hull, Clerk

Exhibit A

Before the
INTERSTATE COMMERCE COMMISSION
Washington, D. C.

M. I. O'BOYLE & SON, INC.—
INTERPRETATION OF CERTIFICATE
Docket No. MC-106965 (Sub. 15)

Petition of Applicant for Reconsideration

Clarence D. Todd

Dale C. Dillon

Attorneys for Applicant

TODD, DILLON & CURTISS
Of Counsel

944 Washington Building
Washington, D. C.
November 8, 1950

21

Before the

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

M. I. O'BOYLE & SON, INC.—

INTERPRETATION OF CERTIFICATE

Docket No. MC-106965 (Sub. 15)

Petition of Applicant for Reconsideration

Division 5 in a report decided November 1, 1949 found that public convenience and necessity required operation by applicant, M. I. O'Boyle & Son, Inc., of Washington, D. C., in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex Counties, N. J., to the site of Bolling Field, in Washington, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience. Thereafter, certain protestants filed a petition for reconsideration. Division 5 reopened the proceeding for reconsideration, and, in a report and order decided October 10, 1950, found that applicant, pur-

22 suant to the authority granted, could use such authority in conjunction with other authority held by applicant to perform a through service. In making such finding Division 5 said:

"There remains for consideration here the question as to whether or not the term 'the site of' as contained in applicant's certificate No. MC-106965 (Sub. No. 15) confers the right to serve outside streets or highways bordering the military reservation, enabling applicant to combine or tack the authorities involved by operating over those streets or highways without actual operations within the field. A site is a plot of ground suitable or set apart for some specific use, and occupied for that purpose. As used in the certificate the term includes only those grounds within the military reservation and does not include adjacent streets, areas, or land in the vicinity. We conclude, therefore, that the highways or streets leading to the gate or adjoining the outer boundary of the military reservation are not authorized points of service which can be said to be points of service common to both authorities and that accordingly the two authorities may not be combined or tacked by any theoretical interchange at any point on any such highway or street. We conclude further that applicant may combine or tack the referred to authorities in the manner hereinbefore discussed, provided that the actual operations conducted thereunder include a physical operation through Bolling Field. If the military officials in charge of the Field prohibit such a physical operation, thus preventing applicant from meeting the above described condition, it may not combine or tack the involved authorities.

We find that applicant may combine or tack the authority granted herein in certificate No. MC-106965 (Sub. No. 15) and that in certificate No. MC-106965, only by operating through the site of Bolling Field, Washington, D. C., as a gateway."

The decision of Division 5 apparently would require applicant to transport a shipment to some point beyond the gate of Bolling Field and return through the gate to the public street or highway. If such is the intent we believe Division 5 is in error in this respect.

Division 5, to support its conclusions quotes from
23 its decision in Missouri Pacific Transportation Co.

Extension—Fort Leavenworth, 41 M.C.C. 545. It misconstrues its own decision in this case, however. The Kansas City and Leavenworth Transportation Company, a protestant in the case before the Commission, brought an action in a Federal court to set aside the decision of the Commission contending, among other things, that the Commission had granted Missouri Pacific Transportation Company authority to operate between points inside the military reservation in competition with the protestant and that there was no evidence to support such finding. The court in Kansas City and Leavenworth Transportation Co. v. U. S., 51 Fed. Supp. 916, sustained the decision of the Commission and commented on the above contention of protestant in the following language:

“The Commission has not attempted to grant authority to service the post exchange or any point inside the Fort. Permission is simply to the site of the Fort. The military authorities may deny Missouri Pacific the right to enter the Fort; or they may grant a permit to service inside the Fort and up to the post exchange.”

The grant of authority in the instant case is similar in all material respects to that granted Missouri Pacific Transportation Company. The authority granted to applicant reads “to the site of Bolling Field.” When applicant operates to the gate of Bolling Field it has conducted all operations which are within the authority granted by the Commission. Any operations beyond the gate are at the sufferance of the military authorities.

24 The same principle was followed in the decision of Division 5 in A. B. & W. Transit Co., Extension, 30 M.C.C. 618, which is referred to by Division 5 in its decision. The Commission in that case found that authority to serve all intermediate points on a regular route between Washington and Mount Vernon included authority to serve National Airport and that no specific authority was needed to operate over roads within the airport grounds. The carrier in that case undoubtedly could establish an interchange point at any place along the highway over which it was authorized to operate and the same is true in the instant case. Applicant may establish an interchange point or a tacking point at the gate of Bolling Field. It is not necessary that it operate into the Field and maintain a tacking point at some place inside such Field. The Commission in other cases has found that no authority is necessary for operation entirely over a private road. See R. E. Parker Contract Carrier Application No. MC-96226 decided September 23, 1940.

 The authority issued applicant authorizes operation to the site of Bolling Field and not to any particular place on the site. When applicant operates one of its vehicles to the gate of Bolling Field it actually has operated off the public highway and to the site of Bolling Field. If the military authorities for any reason should elect to receive shipments at the gate, applicant still would be within the authority granted it if it operated to the gate and delivered shipments to military authorities

25 at that point. There is a space of approximately 30 feet between the edge of the public highway and the gate to the Field in which any vehicle must wait until it gets clearance from the guards at the gate before entering the Field. The space between the public highway and the gate is just as much the site of Bolling Field as any place beyond the gate. Applicant in the past has

operated only over the highway past the gate but it would be no inconvenience to applicant to bring its trucks into this area between the highway and the gate and continue on from there to some destination beyond Bolling Field.

We believe that Division 5 is in error when it says that, as used in the certificate, the term "site" includes only those grounds within the military reservation and does not include adjacent streets, areas or land in the vicinity. The site of Bolling Field actually includes land on both sides of the highway which passes the gate. There are a group of houses on the opposite side of the highway which at this time are on land which is a part of the site of Bolling Field and which are under the control of the military officials of Bolling Field. It was necessary to tear down several of these houses when South Capitol Street was extended to provide an approach to a bridge across the Anacostia River. All of the land which is now South Capitol Street contiguous to Bolling Field and which passes the gate to Bolling Field, actually was

26 given to the District of Columbia for highway purposes by the military department. The official plats in the files of the District of Columbia show all of this land still to be a part of the plats which constitute Bolling Field.

Applicant should not be required to operate from the highway to a place inside Bolling Field and back to the highway, regardless of the distance from the highway to the nearest place which technically is on the site of Bolling Field. The finding of Division 5 that applicant, in performing a through service from an origin in New Jersey or Pennsylvania to a point beyond the Washington Commercial Zone, must actually take the shipment into Bolling Field and out again, is contrary to one of the cardinal principles of tariff construction, namely, that a carrier will not be required to perform unnecessary or

wasteful transportation to afford a shipper the benefit of a through route.

The Commission has found consistently in numerous cases over the past forty years that rail carriers are not required to physically transport a shipment from an intermediate junction point to a basing point and back again to such junction point to make applicable the combination of rates to and from such basing point. See *American Agricultural Chemical Co. v. Houston & B. V. Ry. Co.*, 57 I.C.C. 177, and *Hastings Poultry Co. v. Erie Ry. Co.*, 213 I.C.C. 81. In the latter case, the Commission said the rule applied although the basing point was a non-agency station with no facilities for rebilling.

27 The same principle is applicable to the instant case. Applicant should not be required to perform transportation that increases the cost of rendering the service, lessens the efficiency of the operation, and benefits no one. Such requirement is contrary to the national transportation policy. The Commission is directed to promote efficient and economical transportation and not to impose expensive and wasteful conditions on the carriers which it regulates.

Division 5 in its report on reconsideration is in error in one other respect. It states on sheet 2, "Bolling Field is located within the Washington commercial zone, but Andrews Field is not so located. See Washington, D. C. Commercial Zone, *supra*, p. 464." This statement is in error to the extent that the division concludes that Andrews Field is not within the Washington, D. C. Commercial Zone.

It is true that substantially all of Andrews Field is outside the Washington, D. C. Commercial Zone. The entrance to the Field, however, is within such zone. Applicant on a few occasions has transported petroleum products from Bolling Field to Andrews Field and such

shipments have been charged rates which are applicable between points within the Washington, D. C. Commercial Zone. This is proper because the only movement over public highways is from the entrance or exit of Bolling Field to the entrance of Andrews Field and all operations in the Field proper are over private roads which are not within the jurisdiction of the Commission.

28 We believe that the report of Division 5 on reconsideration should be clarified to the extent that it will be stated very clearly therein that the applicant is not required to transport any shipment to any particular place on the site of Bolling Field and that it may use its authority to Bolling Field in conjunction with other authority from Bolling Field if a shipment is transported over the highway contiguous to the entrance of Bolling Field and over connecting highways to the final destination. We believe also that the statement with respect to Andrews Field should be clarified. If necessary we are willing to file with the Commission official maps which will show that the entrance to Andrews Field is within the Washington, D. C. Commercial Zone.

This case should be reopened solely for the purpose of correcting the statements of Division 5 in the manner and to the extent hereinabove set out.

Respectfully submitted,

M. I. O'BOYLE & SON, INC.

By

Clarence D. Todd

Dale C. Dillon

Its Attorneys

TODD, DILLON & CURTISS

Of Counsel

944 Washington Building

Washington, D. C.

November 8, 1950

30 Filed Oct 5 1951 Harry M. Hull, Clerk

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-106965 (Sub-No. 15)

M. I. O'BOYLE & SON, INC., EXTENSION—
BOLLING FIELD

Submitted February 3, 1949 Decided November 1, 1949

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points in specified counties in New Jersey and Pennsylvania to the site of Bolling Field, D. C. and the site of Andrews Field, Md., traversing Delaware for operating convenience. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Dale C. Dillon for applicant.

F. W. Denniston for interveners in support of application.

Harry S. Elkins, Carl Helmetag, Jr., and Harold G. Hernly for interveners in opposition to the application.

*Report of the Commission*DIVISION 5, COMMISSIONERS LEE, ROGERS,
AND PATTERSON BY DIVISION 5:

Exceptions were filed by applicant to the order recommended by the examiner, and certain interveners in opposition replied. Our conclusions differ slightly from those recommended.

By application filed August 31, 1948, as amended, M. I. O'Boyle & Son, Inc., of Washington, D. C., doing business as O'Boyle Tank Lines, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle (1) of petroleum products, in bulk, in tank trucks, over irregular routes, from points in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex Counties, N. J., to Baltimore, Md., and points in Baltimore, St. Marys, Calvert, and Prince Georges Counties, Md., and those in the Washington commercial zone, 31 as defined in Washington, D. C., Commercial Zone, 3 M.C.C. 243 and 48 M.C.C. 460, and (2) of rejected shipments from Baltimore and points in the described destination area to points in the specified origin area, traversing Delaware for operating convenience. The Department of the Army intervened in support of the application, and certain rail and motor carriers oppose the application.

Applicant now holds certificates which authorize, insofar as here pertinent, operation as a motor common carrier of petroleum products, over irregular routes, (1) from Baltimore to points in the Washington commercial zone and (2) from Norfolk, Va., and points in Norfolk and Princess Anne Counties, Va., to Washington and points in St. Marys, Calvert, and Prince Georges Counties. It holds temporary authority, pending the determi-

nation of the instant proceeding, as a motor common carrier over irregular routes, (1) of petroleum products in bulk, in tank trucks, from Philadelphia and Marcus Hook, Pa., Bayway, Paulsboro, and Bayonne, N. J., Norfolk, and points within 10 miles of each of these origins, to Andrews Field, Md., and Washington, and (2) of gasoline, in bulk, in tank trucks, from Sewaren, N. J., to Patuxent River Naval Base, Md., the latter being restricted to traffic for the U. S. Government moving on government bills of lading.

Applicant operates approximately 55 tank vehicle units. Normally, these vehicles are operated to capacity during the winter months, but during the summer they are not operated to capacity. There are several refineries in the origin area specified in the application, and apparently one of applicant's main reasons for filing the instant application is the desire to render existing customers a more complete service by obtaining authority to originate petroleum products in a much broader origin area. Another reason is the fact that some of these refineries produce special products not available in the origin area now served by applicant, which has received a few requests from its present customers for service on these special products.

Seven shipper representatives adduced evidence in support of the application. One witness, a military official of the Department of the Air Force, expressed a need for the proposed service to Andrews Field and Bolling Field,

32 D. C. In conducting operations these air bases consume gasoline of various grades and certain jet propulsion fuels, and applicant's existing service is utilized to supply their needs to a considerable extent. Generally, the origins from which applicant now renders service are not capable of supplying all the needs of these bases. The usual supply points for these air fields are located at Baltimore, Bayonne, Paulsboro, Philadelphia,

(including Point Breeze and Girards Point), Marcus Hook, and Norfolk (Sewells Point, Va.) and the air force desires the proposed service so that it can use applicant from any one or all of these origins. Purchases from the oil companies normally are made f.o.b. refinery and the products are usually shipped on government bills of lading. With respect to available transportation service, it has been the experience of the air force that one motor carrier cannot generally meet all of the demands for service and, although rail tank cars are available to a limited extent, it prefers to use such cars on longer hauls than those involved herein.

A farmers' cooperative, engaged in the business of distributing petroleum products to its members, arranges for the storage of such products at Baltimore. The cooperative operates nine tank vehicles of its own and at the present time applicant is used by it to some extent for service from Baltimore to certain points in northern Virginia near Washington. This shipper also sells certain products to a consumer cooperation in Washington where it also has facilities for storage. In the future it plans to use Marcus Hook as a source of supply, and desires the proposed service from that point principally to Baltimore and points in Baltimore County, where it has customers. Occasionally, in the past, its supplies at Baltimore have become exhausted and it was necessary to supply its customers from Marcus Hook. Witness, however, did not know that certain existing motor carriers of bulk petroleum products already have authority to operate from Marcus Hook into the Baltimore area.

An oil company, engaged in refining petroleum, operates refineries at Linden and Pettys Island, N. J., and maintains storage facilities at those points. It has a so-called terminal arrangement in Baltimore and uses applicant's existing service from that point to Rosslyn, Falls Church and Fairfax, Va., and because applicant has ren-

dered satisfactory service in the past it desires the service proposed herein, principally from Essex and Camden Counties to Baltimore County and certain
33 points in the Washington Commercial zone. The storage facilities which this shipper maintains at Baltimore are not owned. The site of such facilities is subject to change, and this fact is pointed to by the witness as a reason for supporting the application to the extent indicated. Also there are occasions when the supply of products at Baltimore becomes depleted and the required supply is furnished from Linden and Pettys Island direct to Baltimore County and certain points in the Washington commercial zone such as Rosslyn. Witness knows that certain existing motor carriers of bulk petroleum products have authority to operate from Pettys Island to the Baltimore area of Maryland. Rail facilities are available to the shipper at Baltimore, Rosslyn and the two specified New Jersey origins, but it does not use its tank cars for the transportation of gasoline in the area involved herein, such cars being restricted to the movement of asphalt, lubricating and diesel oils.

A company engaged in the production of certain products, generally referred to as "petroleum specialties," such as solvents, operates a plant at Carteret, N. J. Shipments are usually made from the latter point and it also plans to originate traffic to some extent from South Kearny, N. J. Relative to the instant application, this company ships its products in bulk and in containers to Baltimore and Washington where it has distributors. Witness stated that the proposed service "would give us (the company), and particularly the customers, access to additional facilities, particularly if there should be any labor difficulties with the present carriers and gives versatility to the orders, filling the orders." Witness' company is now using the existing bulk transportation service of certain motor carriers which now operate from Carteret to Baltimore.

A nationally known oil company engaged in refining petroleum operates plants at Bayonne and Bayway, N. J. It also operates a refinery and storage facilities at Baltimore, and in the past has used applicant's authorized service from that point. Certain special products are available at Bayonne and Bayway which are not produced in Baltimore and apparently this company is principally interested in the proposed service to the extent of having applicant transport these special products. Witness, however, concedes that his company now has available the service of at least two motor carriers which have authority to operate from Bayonne and Bayway to
34 Washington and Baltimore. Notwithstanding this fact, witness is of the opinion that the service proposed herein should also be available to improve the ability of his company in providing a more flexible service.

Another major oil company operates a refinery at Marcus Hook, and supplies its storage plants at Washington and Baltimore by pipeline. This pipeline service, however, is supplemented to some extent by motor carrier service, and usually about 2 tank vehicle loads are shipped weekly to Baltimore and approximately the same volume to Washington. Although there is existing motor carrier service presently available to the shipper for these movements from Marcus Hook, it is nevertheless desirous of obtaining the additional service proposed by applicant herein. Such desire is based on the belief that the added service would improve the oil company's condition with respect to transportation service in the event the existing service should for some reason become unavailable. Normally, the Maryland area and points in the Washington commercial zone are served by this shipper from storage facilities at Baltimore or Washington.

A wholesale distributor of petroleum products at Washington also desires applicant's proposed service. At the present time it maintains 17 storage tanks of 20,000-gal-

lon capacity each for storing gasoline, motor oil, cleaning fluids, and naptha. The last-mentioned commodity and certain cleaning fluids usually are received in 55 gallon containers. This distributor, however, plans to expand, and is conducting negotiations with a supplier of petroleum specialties for delivery of tank-vehicle loads. It is anticipated that such traffic will originate at Carteret and Bayonne, and will amount to approximately four or five tank vehicle loads monthly. At the present time it is purchasing certain petroleum products in bulk from a large oil company in Washington and Baltimore and applicant's existing service is utilized exclusively to transport this traffic. Witness knows that certain motor carrier service is already available for service from Carteret and Bayonne to Washington. Apparently, however, since applicant has provided all of the shipper's bulk transportation in the past this distributor prefers to continue having the same carrier available for service from the two new origins specified herein.

Leaman Transportation Corporation, E. Brooke Matlack, Inc., and Coastal Tank Lines, Inc., hereinafter called

35 Leaman, Matlack, and Coastal, respectively, presented evidence in opposition to the application.

Leaman holds a certificate which authorizes, insofar as here pertinent, operation over irregular routes as a motor common carrier (1) of petroleum products, in bulk, in tank trucks, except liquid wax and except those requiring attached heater equipment, from points in the Philadelphia commercial zone as defined by the Commission to points in Maryland, and (2) of lubricating oil, in bulk, in tank trucks, from Marcus Hook, to Washington. Marcus Hook and Pettys Island are located within the Philadelphia commercial zone and are served by this carrier. Leaman operates approximately 125 tractor-trailer units, and about half of this equipment is stationed in the Philadelphia area. Although Andrews Field is located in Maryland and Leaman has authority to serve that air

base from the authorized origin areas described above, it does not oppose the application insofar as applicant seeks to serve Bolling Field and Andrews Field on traffic moving on government bills of lading. It does, however, oppose the application with respect to traffic moving from the Philadelphia commercial zone to the described destination points for shippers other than the air force.

Matlack presented evidence that it is operating as a motor carrier of petroleum products, in bulk, in tank trucks, from Bayonne, Bayway, Belleville, Bloomfield, Carlstadt, Carteret, East Rutherford, Edgewater, Elizabeth, Garwood, Gibbsboro, Glen Ridge, Harrison, Hoboken, Irvington, Jersey City, Linden, Lodi, New Brunswick, Newark, Nutley, Rahway, Sewaren, South River, and Woodridge, N. J., to Baltimore and points in the Washington commercial zone. Matlack operates about 45 vehicles from the Bayonne area, and approximately the same number of vehicles are stationed in the Baltimore and Philadelphia areas. Its terminal at Woodridge, in New Jersey, is located only a short distance from Carteret and Bayonne, and usually requests from shippers to move products from these New Jersey origins are complied with promptly. The shipments generally are delivered the day following receipt of such requests. For shippers, other than the air force, Matlack averages about one tank load daily from northern New Jersey points to Baltimore or Washington.

Coastal transports under appropriate authority petroleum products, in bulk, in tank trucks, from Bayonne, Tremley Point, Sewaren, and points within five miles of each to points in a specified portion of Maryland on
 36 and east of a line beginning at the Maryland-Pennsylvania State line and extending along U. S. Highway 222 to junction U. S. Highway 1, thence along U. S. Highway 1, including all points in Maryland east of Chesapeake Bay. It is also operating from Paulsboro

and points in the Philadelphia commercial zone to points in the same described destination area. This carrier maintains terminals at Baltimore, Philadelphia, Paulsboro, and one near Washington. It operates about 245 tank vehicle units, of which 80 are utilized in operations from the four terminals named. At the present time Coastal is performing service for the petroleum specialties shipper mentioned herein from Carteret to Baltimore, and it is also transporting aviation gasoline from Bayonne to Baltimore for a major oil company. It has received no complaints from shippers on service performed within the described area.

The examiner recommended that applicant be granted authority as a motor common carrier of aircraft fuels, in bulk, in tank vehicles, from points in Delaware and Philadelphia counties, and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex counties, to Bolling Field and Andrews Field, traversing Delaware for operating convenience, over irregular routes, restricted to the transportation of traffic moving on U. S. Government bills of lading.

On exceptions applicant contends that the commodity description specified by the examiner is too restrictive, and that it should have authority to transport all petroleum products. It also contends that the service it proposes to Bolling Field and Andrews Field should not be limited to traffic moving on government bills of lading, and that it should be permitted to render the proposed service to all shippers indiscriminately. Exception is also taken to the findings of the examiner with respect to the destination territory, applicant contending that it should be authorized to serve all of the destination area sought. This latter contention is based principally on the argument that applicant should be authorized to serve its present destination area from any origin point at which its customers may obtain petroleum products. Applicant

cites two proceedings to support its argument, No. MC-26519 (Sub-No. 22), Wheeler Transportation Company Extension—Petroleum Products, 47 M.C.C. 840, decided July 9, 1947, and Rogers Cartage Company Extension—Wisconsin, 48 M.C.C. 761, decided June 7, 1948. On reply, the opposing carriers contend that the record supports only the authority recommended by the examiner.

They point to the fact that the record indicates
 37 that all of the traffic to Bolling Field and Andrews Field, in which applicant has participated, moved on government bills of lading and for this reason they argue that the restriction imposed by the examiner should be retained.

With respect to the two named air fields, we are of the opinion that such service as applicant proposed should not be restricted to traffic moving on government bills of lading. Nor do we believe that such service should be limited to the transportation of "air craft fuels". Notwithstanding the fact that the government witness indicated that these air bases are immediately concerned only with the transportation of various grades of gasoline and jet propulsion fuels, we conclude that applicant should be permitted to render a complete service insofar as the commodity description is concerned and in our findings herein the term petroleum products will be used in lieu of aircraft fuels.

In every proceeding of the type here considered it is the burden of the applicant therein to prove public convenience and necessity for the motor carrier transportation operation proposed, and if the evidence shows that certain motor carrier service is already available in the involved area it then follows that inadequacy must be shown to exist with respect to such available service. In the instant proceeding, aside from the operations proposed to the two named air bases, it is clear that existing motor carrier service for the transportation of pe-

troleum products, in bulk, in tank vehicles, is reasonably adequate. In the two cases relied upon by applicant, the grant of authority to one applicant was predicated upon the lack of any motor common carrier service to meet the supporting shipper's transportation needs, while in the other case there was a deficiency in the service of the available motor common carrier.

In the instant proceeding it is clear that there are motor common carriers possessing the necessary authority whose facilities are available to the shippers supporting the application and there has been no convincing showing that the available service is inadequate for the needs of these shippers, other than to and from the air bases. With this exception, we conclude that no real need has been shown for the proposed operations

38 Shipments which have been rejected by the consignee because damaged in transit or for any other reason, may be returned to their respective origins by the carrier having them in its possession without specific authority, provided such service is covered by an appropriate tariff provision. However, shipments which have once been accepted by a consignee and which such consignee later desires for any reason to return (reship) to the original consignor, may not be transported on return without authority.

Applicant is fit and able, financially and otherwise, properly to perform the operations hereinafter authorized.

We find that present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of petroleum products, in bulk, in tank vehicles, from points in Delaware and Philadelphia counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex counties,

N. J., to the site of Bolling Field, in Washington, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience only; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act, and with the rules and regulations of the Commission thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

39

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 1st day of November, A. D. 1949.

No. MC-106965 (Sub-No. 15)

M. I. O'BOYLE & SON, INC., EXTENSION—
BOLLING FIELD

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 5.

(SEAL)

W. P. BARTEL,
Secretary.

40 Filed Oct 5 1951 Harry M. Hull, Clerk

CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY

NO. MC 106965 SUB 15

M. I. O'BOYLE & SON, INC.,

DOING BUSINESS AS O'BOYLE TANK LINES,
WASHINGTON, DISTRICT OF COLUMBIA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 23rd day of January, A. D., 1950

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Petroleum products, in bulk, in tank vehicles, over irregular routes,

From points and places in Delaware and Philadelphia Counties, Pa., and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex Counties, N. J., To the site of Bolling Field, in Washington, D. C., and the site of Andrews Field in Prince Georges County, Md., traversing Delaware for operating convenience only, with no transportation for compensation on return except as otherwise authorized.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL,

(SEAL)

Secretary.

41

Filed Dec 6 1951

* * * *

Plaintiff's Request for Admission of Facts Under Rule 36

The Plaintiff, the Interstate Commerce Commission, requests the defendant, M. I. O'Boyle & Son, Inc., doing business as O'Boyle Tank Lines, within 15 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

(a) In transporting shipments of petroleum products in bulk, in tank vehicles, over irregular routes from origin points mentioned in Paragraphs VI and XI of the Complaint to destination points mentioned in Paragraphs

IV and XI of the Complaint, the defendant did not and does not cause its vehicles physically to enter the military reservation of Bolling Air Force Base in Washington, D. C., commonly called Bolling Field, by causing its vehicles to pass from the public highway known as South Capitol Street bordering and outside said Bolling Air Force Base, past the military guard at the
42 gate to such Bolling Air Force Base, into the Base proper, and thence returning through the said gate to said South Capitol Street bordering said Base.

(b) In transporting shipments of petroleum products in bulk, in tank trucks, over irregular routes from origin points mentioned in Paragraphs VI and XI of the Complaint to destination points mentioned in Paragraphs IV and XI of the Complaint, the defendant did and does cause its vehicles to traverse the public highway known as South Capitol Street bordering and outside the fence enclosing Bolling Air Force Base in Washington, D. C., commonly called Bolling Field, thence onto the "apron" or strip of land approximately twenty to thirty feet in width between said South Capitol Street and the fence enclosing said Air Force Base, and thence returning over said "apron" or strip of land to said South Capitol Street bordering and outside the fence enclosing said Air Force Base.

(c) On or about November 18, 1950, Attorneys Clarence D. Todd and Dale C. Dillon, of Washington, D. C., as counsel for the defendant, received a copy of the following letter dated November 17, 1950, sent by Brigadier General C. B. Mickelwait, Assistant Judge Advocate General, for the Judge Advocate General, Department of the Army, to Secretary W. P. Bartel of the Interstate Commerce Commission at Washington, D. C.:

43

DEPARTMENT OF THE ARMY

Office of the Judge Advocate General

17 Nov. 1950

C 1837

JAGL 1948/8486

Interstate Commerce Commission,
Washington 25, D. C.

Re: M. I. O'Boyle & Son, Inc.—Interpretation of
Certificate, I. C. C. Docket No. MC 106965, Sub No. 15.

Dear Mr. Bartel:

Reference is made to the report of the Commission on
reconsideration by Division 5, decided 10 October 1950, in
this proceeding.

It is noted that the Commission, Division 5, ruled that
M. I. O'Boyle & Son, Inc., may combine or tack the
authority granted in its certificate in Docket No. MC
106965, Sub No. 15 with that held by it in certificate No.
MC 106965, provided that operations are performed
through the site of Bolling Field, Washington, D. C. as
a gateway.

In the report of 10 October 1950, Division 5, said:

"* * * We conclude, therefore, that the highways or
streets leading to the gate or adjoining the outer bound-
ary of the military reservation are not authorized
points of service which can be said to be points of service
common to both authorities and that accordingly the two
authorities may not be combined or tacked by any theo-
retical interchange at any point on any such highway or
street. We conclude further that applicant may combine
or tack the referred to authorities in the manner herein-
before discussed, provided that the actual operations con-
ducted thereunder include a physical operation through
Bolling Field. If the military officials in charge of the

Field prohibit such a physical operation, thus preventing applicant from meeting the above described condition, it may not combine or tack the involved authorities."

In connection with the application of M. I. O'Boyle & Son, Inc., in Docket No. MC 106965, Sub No. 15, the Departments of the Army and Air Force supported the application to the extent that operations to Andrews Field, Maryland and Bolling Field, Washington, D. C. were involved. These Departments are not concerned with or interested in the combined authority which the carrier desires to exercise by a "tacking" of its separate certificates.

In the event the Commission considers that a physical operation inside the gates of Bolling Field is a prerequisite to the "tacking" of the separate authorities, this office feels constrained to inform the Commission that the Commanding General at Bolling Air Force Base has been instructed by the Chief of Staff, United States Air Force as follows:

"It is not desired that subject carrier (M. I. O'Boyle & Son, Inc.) be permitted to enter Bolling AF Base for the sole purpose of * * * 'tacking' of rights. Such
44 a procedure would necessarily be hazardous, present an added traffic burden and materially contribute to deterioration of Base roadways.

"In the event subject company requests permission from Bolling AF Base to operate through the installation in such a manner, permission should be denied and the matter referred to this Headquarters."

Sincerely yours,

/s/ C. B. MICKELWAIT,
Brigadier General, USA
Assistant Judge Advocate
General

cc: Clarence D. Todd
 Dale C. Dillon
 Harry S. Elkins
 Carl Helmetag, Jr.
 Harold G. Hernly

(d) Subsequent to the issuance on October 10, 1950, of the report by Division 5 of the Interstate Commerce Commission in defendant's docket No. MC-106965 Sub 15, as described in Paragraph VII of the Complaint, and subsequent to the issuance on March 5, 1951, of the order of the entire Interstate Commerce Commission denying the defendant's petition for reconsideration of the report of said Division 5 of October 10, 1950, as described in Paragraph IX of the Complaint, the defendant did not file and has not filed any action in a District Court of the United States seeking a review by such court of said action by Division 5 of the Interstate Commerce Commission or by the entire Interstate Commerce Commission, or seeking an injunction to restrain the Interstate Commerce Commission from carrying into effect its said action.

* * * *

46

Filed Dec 13 1951

*Reply of Defendant to Plaintiff's Request for
 Admission of Facts Under Rule 36*

Defendant, M. I. O'Boyle & Son, Inc., submits the following reply to Plaintiff's Request For Admission of Facts Under Rule 36. References to paragraphs are to those so designated in Plaintiff's Request.

1.(a) Defendant admits the facts set forth in paragraph 1 (a).

1.(b) Defendant admits the facts set forth in paragraph 1 (b).

1.(c) Defendant admits the facts set forth in paragraph 1 (c).

1.(d) Defendant neither admits nor denies the facts as set forth in paragraph 1 (d). The Report of the Commission on Reconsideration, by Division 5, decided October 10, 1950, was a report issued in response to a petition by certain motor carrier interveners in the proceeding before the Commission. The original Report of the Commission, by Division 5, decided November 1, 1949, (see Exhibit B attached to Defendant's Answer) and the Order issued concurrently with such report had become final and a certificate of public convenience and necessity (see Exhibit C attached to Defendant's Answer) had been issued prior to the order which reopened the proceeding for reconsideration.

The report on reconsideration was not a part of the order entered November 1, 1949. It was not an order and was not by reference made a part of any order. The only orders entered by the Commission in its Docket MC-106965 Sub 15 which require this defendant to do, or cease from doing, any act are the order of November 1, 1949 and the Certificate of Public Convenience and Necessity issued January 23, 1950. There was, therefore, no order implementing the findings of Division 5 as set forth in its report of October 10, 1950, which could or would be reviewed by a Court.

The Commission's Order March 5, 1951, a copy of which is attached hereto, marked Exhibit D, and made a part hereof, did two things:

(1) It overruled a motion of intervening motor carriers to make a part of the record the letter from the Assistant Judge Advocate General, set forth in Plaintiff's Request for Admission of Facts, and

(2) It denied the petition for reconsideration which is attached to defendant's answer herein as Exhibit A thereto.

Since the petition for reconsideration only sought clarification of the report, denial of such petition was not an order directing defendant to do, or cease from doing, any specific act. If the Commission had entered an order at any stage of the proceeding after issuance of the certificate on January 23, 1950, which restricted the right of defendant to operate pursuant to such certificate, such order would have been a partial revocation of defendant's certificate contrary to the provisions of Section 212 (a) of the Interstate Commerce Act (Title 49 U. S. Code Section 312 (a)).

The institution of this injunction proceeding is the first and only action of the Interstate Commerce Commission that affords an opportunity for Court review of the interpretation which the Commission has given of the rights and privileges of defendant pursuant to the certificates issued to it by the Commission.

A case directly in point on this question is *Shannahan v. U. S., D. C., Ind.*, 1937, 20 F. Supp. 1002, affirmed 303 U. S. 596, 58 S. Ct. 732. The Court held that a written report by the Commission containing the statement that "we find that" specified railroad "is not a street, interurban, or suburban electric railway within the meaning of (Railway Labor Act) and it is therefore subject to the provisions of that Act" was a mere finding which might later be modified or withdrawn, and upon which an order might be made, and was not an "order" so as to be subject to review by a statutory three judge court. There was no act of the Commission which could be the subject of relief in Court until the Commission implemented its finding with an order or took some specific action to enforce its finding.

48 In an earlier case, a U. S. District Court held that a report of the Commission in which it found that a rail carrier had surplus earnings within the recapture provisions of the Interstate Commerce Act and

should pay the proper share of such surplus to the Commission, but which was not accompanied by an Order directing such payment, was not reviewable. The Court held that, until the Commission took some specific step to require payment by the rail carrier, there was no basis for relief. See *Brooklyn Eastern Dist. Terminal v. U. S.*, D. C., N. Y., 1927, 28 F. 2d 364. Also see *Canadian River Gas Co. v. Federal Power Comm.*, 113 F. 2d. 1010. The same principle has been followed by the U. S. Court of Appeals for the District of Columbia in holding that, in the absence of a judgment on a directed verdict, there is nothing to review. See *Weiss v. District Title Ins. Co.*, 1941, 121 F. 2d. 900, 74 app. D. C. 126.

Defendant admits that it sought in vain to obtain a different interpretation by the Commission of its rights under the certificates of public convenience and necessity issued to it, but denies that it has waived its right in this proceeding to insist upon the interpretation for which it contended in the proceeding before the Commission. See *W. P. Brown & Sons Lbr. Co. v. Louisville & N. R. Co.*, 299 U. S. 393 at 399.

* * * *

51

Exhibit D

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of March, A. D. 1951.

No. MC-106965 (Sub-No. 15)

M. I. O'BOYLE & SON, INC., INTERPRETATION OF
CERTIFICATE
(Washington, D. C.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Applicant's petition, dated November 8, 1950, for reconsideration;

(2) Joint reply of E. Brooke Matlack, Inc., Leaman Transportation Corporation and Coastal Tank Lines, Inc., interveners, dated November 28, 1950, including their motion to make a part of the record a letter received from the office of the Judge Advocate General, Department of the Army, dated November 17, 1950;

and good cause appearing therefor:

It is ordered, That interveners' motion be, and it is hereby, overruled, for the reason that the said letter is of no particular significance in view of the division's statement that applicant may not combine or tack the involved authorities if the appropriate military officials prohibit such a physical operation;

It is further ordered, That applicant's petition be, and it is hereby, denied, for the reason that it does not set forth sufficient grounds to warrant any change in the findings of Division 5.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

• • • •

52

Filed Apr 9 1952

Motion of Coastal Tank Lines, Inc., E. Brooke Matlack, Inc., and Leaman Transportation Corporation to Intervene as Plaintiffs

Coastal Tank Lines, Inc., E. Brooke Matlack, Inc. and Leaman Transportation Corporation move for leave to intervene as plaintiffs in this action, in order to assert the claim set forth in the proposed complaint in intervention of which a copy hereto is attached, on the

grounds that they were the petitioners who initiated the proceeding before the Interstate Commerce Commission known as M. I. O'Boyle & Son, Inc. Interpretation of Certificate, 52 M.C.C. 284, and as such were parties in interest to said proceeding wherein defendant's certificates were interpreted to require operation through Bolling Field in Washington, D. C. as a prerequisite to a joinder of the separate operating rights embraced therein; that they are so situated as to be directly and immediately affected adversely by the disposition of the property which is subject to the disposition of the court; and that their claim and the main action have a question of law and of fact in common.

* * * *

58

Filed May 1 1952

Order Granting Intervention

This cause coming on to be heard at this term of court upon the motion of Coastal Tank Lines, Inc., E. Brooke Matlack, Inc., and Leaman Transportation Corporation for leave to intervene as parties plaintiff, and the court having considered said motion and the complaint of intervention tendered herewith, and it appearing to the court that the said Coastal Tank Lines, Inc., E. Brooke Matlack, Inc. and Leaman Transportation Corporation, should be permitted to intervene herein as prayed in said motion, and the court being duly advised of the premises, it is by the court, this 1st day of May, 1952,

Ordered, Coastal Tank Lines, Inc., E. Brooke Matlack, Inc., and Leaman Transportation Corporation be and they are hereby granted leave to intervene in this cause, and they are hereby made a party to this cause, and to that end the intervenors' complaint of intervention heretofore tendered as an exhibit to said motion is hereby considered and stands as the complaint of the inter-

venors, Coastal Tank Lines, Inc., E. Brooke Matlack, Inc., and Leaman Transportation Corporation as such parties plaintiff.

That this order is to be without prejudice to any proceeding heretofore had in this cause.

/s/ Walter M. Bastian
Judge

• • • •

60

Filed May 8 1952

Motion by Plaintiff for Summary Judgment

The plaintiff, Interstate Commerce Commission, hereby moves the court for a summary judgment in its favor pursuant to Rule 56 of the Federal Rules of Civil Procedure, and prays that a permanent injunction be rendered against the defendant in accordance with Paragraph (A) of the demand for judgment in the complaint filed in this action on September 25, 1951, and assigns the following reasons in support of said motion:

(1) The pleadings filed in this case, consisting of the Complaint filed by the plaintiff, the Answer thereto filed by the defendant, the Plaintiff's Request for Admission of Facts Under Rule 36, and the Reply of the Defendant to said plaintiff's request, all show that there is no genuine issue between the parties as to any material fact, that the only existing issue between the parties is one of law as applied to those facts, and that the plaintiff is entitled as a matter of law to a judgment of permanent injunction in accordance with Paragraph (A) of the demand for judgment in the plaintiff's Complaint.

• • • •

Filed May 28 1952

*Plaintiff's Supplemental Request for
Admission of Facts Under Rule 36*

The Plaintiff, the Interstate Commerce Commission, requests the defendant, M. I. O'Boyle & Son, Inc., doing business as O'Boyle Tank Lines, within 10 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

(a) The defendant, M. I. O'Boyle & Son, Inc., intervened in opposition to the grant of an application filed with the Interstate Commerce Commission on September 15, 1949 by Leaman Transportation Corporation, of Downingtown, Pennsylvania, in its Docket No. MC-104347 (Sub No. 75), whereby Leaman Transportation Corporation sought authority to transport petroleum products in bulk, in tank vehicles, from points in the Philadelphia, Pennsylvania commercial zone to all points in Virginia, over irregular routes.

(b) That on December 20, 1950 Division 5 of the Interstate Commerce Commission issued its report and order in the application of Leaman Transportation Corporation, hereinbefore described in paragraph (a) of this request, and a certified copy of the report and order of December 20, 1950 is attached hereto and marked Exhibit A.

(c) Subsequent to the issuance December 20, 1950 of the report and order by Division 5 of the Interstate Commerce Commission, Leaman Transportation Corporation Docket No. MC-104347 (Sub No. 75), as described in paragraph (a) of this request, the defendant,
68 M. I. O'Boyle & Son, Inc., did not file, and has not filed, any petition for reconsideration by the

entire Interstate Commerce Commission of the action of December 20, 1950, and the defendant did not file, and has not filed, any action in a District Court of the United States, seeking a review by such Court of said action of December 20, 1950, or seeking an injunction to restrain the Interstate Commerce Commission from carrying into effect its said action of December 20, 1950.

* * * *

69

Filed May 28 1952

INTERSTATE COMMERCE COMMISSION

No. MC-104347 (Sub-No. 75)

LEAMAN TRANSPORTATION CORPORATION
EXTENSION—VIRGINIA

Submitted May 11, 1950. Decided December 20, 1950.

* * * *

*Report of the Commission*DIVISION 5, COMMISSIONERS LEE, ROGERS,
AND CROSS

BY DIVISION 5:

Exceptions were filed by interveners and applicant, respectively, to the order recommended by the examiner. Applicant replied to those of interveners', and an intervener replied to the exceptions of the applicant. Our conclusions differ slightly from those recommended.

By application filed September 15, 1949, Leaman Transportation Corporation, of Downingtown, Pa., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of petroleum products, in

bulk, in tank vehicles, from points in the Philadelphia commercial zone, as defined in Philadelphia, Pa., Commercial Zone, 17 M.C.C. 533, to points in Virginia, over irregular routes, traversing Delaware, Maryland, 70 West Virginia, and the District of Columbia for operating convenience only. Certain rail carriers and one motor carrier oppose the application.

* * * *

72 O'Boyle, the only motor carrier to offer evidence in opposition to the application, has authority, insofar as here material, to operate as a common carrier of petroleum products in bulk, in tank vehicles, over irregular routes, (1) from points in the Washington, D. C., commercial zone to points in Virginia on and north of U. S. Highway 60, except points in Accomac and Northampton Counties, and (2) from points in Delaware and Philadelphia Counties, Pa., including Marcus Hook, to Bolling Field in Washington. Combining these separate grants of authority theoretically at Bolling Field, the common point of service, O'Boyle has been transporting bulk petroleum products, including liquefied petroleum gas, from Marcus Hook to points in its authorized Virginia destination territory. It now serves several petroleum shippers in the movement of bulk petroleum 73 products from Marcus Hook, or points near Marcus Hook, to points in its Virginia destination territory. O'Boyle operates 15 trucks daily from the Philadelphia-Marcus Hook area to various destinations and it can supply Marcus Hook shippers with clean tank trailers at any time needed upon a few hours notice. It maintains terminals and has facilities for cleaning tank trailers at Baltimore and Washington. It has ample equipment and facilities, and within the scope of its operating authority, is willing to provide Sun and Sears with the desired service from Marcus Hook to points in Virginia.

The examiner recommended that applicant be authorized to transport (1) lubricating oil from Marcus Hook to Staunton, Shadwell, Charlottesville, Roanoke, Winchester, Waynesboro, and Norfolk, Va., and (2) liquefied petroleum gas from Marcus Hook to Chincoteague Island, over irregular routes. On exceptions, O'Boyle contends that existing motor service is adequate and that no need is shown for the proposed service. Rail interveners contend on exceptions that the need for service is limited to the transportation of liquefied petroleum gas from Marcus Hook to Chincoteague Island. In reply, applicant contends that the service provided by O'Boyle from Marcus Hook to Virginia points is not authorized and is being performed through an unlawful tacking of its separate authorities. In its exceptions, applicant urges that a need is shown for the proposed service to all points in Virginia and that the entire authority sought should be granted. O'Boyle in reply to applicant's exceptions argues that it is authorized, and is willing and able to provide the considered service from Marcus Hook to its authorized points in Virginia.

74 It is expedient that we first decide whether or not O'Boyle has authority, by tacking to provide the service herein involved from Marcus Hook to points in Virginia on and north of U. S. Highway 60, except those in Accomac and Northampton Counties. O'Boyle contends that it now provides such service for various shippers other than those appearing herein, and that it is able and willing to perform the service shown to be required by Sun and Sears. It should be noted in this connection that in M. I. O'Boyle & Son, Inc., Interpretation of Certificate, M.C.C. , (No. MC-106965 (Sub-No. 15)), we decided that under some conditions or circumstances O'Boyle could lawfully tack its authority at Bolling Field, and thus serve from Marcus Hook to points in its authorized Virginia destination area. The impor-

tant question still before us is whether or not O'Boyle can, as a practical matter, comply with the terms under which we concluded that such tacking could be accomplished, namely, whether it is able in each shipment from Marcus Hook to points in Virginia to physically operate *through Bolling Field*. Whether O'Boyle can operate in this manner depends upon the military authorities. There is nothing in the present record to support a finding that it can, or would be allowed so to operate. Actually it appears doubtful that it can. To deny a part of the authority sought herein because of the claimed service of O'Boyle would amount to an affirmative finding that this carrier not only can under some circumstances lawfully provide the service, but that it is in fact allowed to physically operate through Bolling Field regardless of the traffic transported. We have no such evidence before us. Furthermore, even if we did conclude that O'Boyle has the appropriate local authority to operate through Bolling Field, there is no showing that it would be adversely affected by applicant's service

75 in the transportation of lubricating oil and liquefied petroleum gas. We are of the opinion that the proposed service is required by the public convenience and necessity to the extent the supporting shippers have shown any material volume of traffic moving.

* * * *

78

Filed Jun 5 1952

*Reply of Defendant to Plaintiff's Supplemental Request
for Admission of Facts Under Rule 36*

Defendant, M. I. O'BOYLE & SON, INC., submits the following reply to Plaintiff's Supplemental Request for Admission of Facts Under Rule 36:

Defendant admits all of the facts set forth in said supplemental request, but denies that any such facts are

material to any issue in this proceeding. In support thereof we direct the attention of the Court to the following statement of Division 5 of the Interstate Commerce Commission, set forth on Sheets 6 and 7 of the exhibit attached to said supplemental request:

Furthermore, even if we did conclude that O'Boyle has the appropriate local authority to operate through Bolling Field, there is no showing that it would be adversely affected by applicant's service in the transportation of lubricating oil and liquefied petroleum gas.

* * * *

80

Filed Jun 18 1952

Stipulation

Whereas counsel for the plaintiff and defendant have investigated the ownership and jurisdiction over certain parcels of land constituting Bolling Field and surrounding area;

IT IS THEREFORE, stipulated and agreed that the facts are as follows:

1. The United States Government holds title to the land upon which is located Bolling Field, South Capitol Street and the Shepherd Parkway.

2. Prior to 1933, jurisdiction over this government land was lodged in the War Department.

3. In 1933, the War Department transferred to the Commissioners of the District of Columbia jurisdiction over that portion of land which now constitutes a part of South Capitol Street it being the westerly portion of the Street to a width of 74 feet.

4. The District of Columbia has jurisdiction over Portland Street to a point inside the gate at Bolling Field.

5. The military authority at Bolling Field maintains beacons and direction lights on the east side of South Capitol Street within the Shepherd Parkway.

6. Under an agreement with the District of Columbia Police Department, Air Force Police patrol the driveway leading from South Capitol Street to the Guard House at Bolling Field.

7. Property located at 1999 Chesapeake Street, which is east of South Capitol Street, is owned by the United States Government.

81 8. The property specified in 7 above is under the jurisdiction of the Air Force.

9. The Air Force has avigation rights over land located east of South Capitol Street in connection with the operation of runways at Bolling Field.

* * * *

82

Filed Jul 7 1952

Judgment of Permanent Injunction

This cause coming on to be heard on June 10, 1952, on respective motions by the plaintiff and defendant for summary judgment, and the Court having considered the plaintiff's complaint and defendant's answer thereto, the complaint of intervening plaintiffs, the plaintiff's requests and supplemental requests for admission of facts under Rule 36 and defendant's replies thereto, the memorandum briefs of plaintiff and defendant, and a stipulation of facts filed on June 19, 1952, and upon hearing argument on behalf of the plaintiff, the intervening plaintiffs, and the defendant, and

It appearing to the Court that defendant is operating its vehicles on highways adjacent to and outside of the military reservation of Bolling Field, that such operation

does not comply with the terms of its operating rights as those rights were interpreted by the Interstate Commerce Commission, and that such operation is in violation of the provisions of 49 U.S.C. 306 (a)(1), the Court, on June 19, 1952, granted the motion of plaintiff for summary judgment and denied the motion of defendant for summary judgment;

83 WHEREFORE, it is, this 7th day of July, 1952,
by the United States District Court for the District of Columbia,

ORDERED, ADJUDGED, AND DECREED that the defendant, M. I. O'Boyle & Son, Incorporated, doing business as O'Boyle Tank Lines, its officers, agents, servants, employees, and attorneys, and all others acting by or under its direction or authority, and all persons, firms, companies, and corporations and their respective officers, agents, servants, employees, and attorneys in active concert or participation with it, be perpetually and permanently enjoined and restrained from in any manner or by any device, directly or indirectly, transporting petroleum products in bulk, in tank trucks, by motor vehicle in interstate commerce for compensation over irregular routes on public highways from any origin point or points located in the Counties of Delaware or Philadelphia in Pennsylvania or in the Counties of Bergen, Essex, Gloucester, Camden, Hudson, Union, or Middlesex in New Jersey to any destination point or points of Martinsburg or Shepherdstown in West Virginia, any point or place in Maryland, or those in that part of Virginia on and north of U. S. Highway 60 except those in Accomac and Northampton Counties in Virginia, unless the defendant, in the course of such transportation, passes through the military reservation known as Bolling Field, in the District of Columbia, or unless and until such time, if at all, as there is in force with respect to the defendant a certificate of public convenience and necessity

or other appropriate operating authority issued by the Interstate Commerce Commission authorizing such transportation from said origin point or points to said destination point or points without the requirement that the defendant traverse said Bolling Field in the course of such transportation;

AND IT IS FURTHER ORDERED that the defendant pay the costs of this proceeding.

/s/ David A. Pine
Judge

* * * *

100

Filed May 16 1952

*Reply of Defendant to Motion by Plaintiff for Summary
Judgement and Affidavit in Opposition Thereto*

Defendant, M. I. O'Boyle and Son, Inc., submits the following reply to Motion By Plaintiff For Summary Judgement:

Defendant admits that there is no issue between the parties as to any evidentiary fact, but alleges that there is a well-defined issue between the parties as to the materiality of these facts in their relation to the issue of law presented by the pleadings of the parties in this proceeding. Defendant contends that, in transporting shipments pursuant to a combination of its operating authorities to the site of Bolling Field and from any place in the District of Columbia to destinations in Maryland, Virginia or West Virginia, when it operates a motor vehicle to the apron which is a part of the entrance to Bolling Field and continues from that point to the destination, it has fully complied with its operating authority and has done all that the Interstate Commerce Commission legally can require it to do.

Defendant attaches hereto an affidavit of Frank L. Grim and certain photographs that present to the Court the location of the main entrance to Bolling Field and its relation to the streets and highways leading from and to Bolling Field.

Plaintiff contends that Defendant must cause its vehicles to pass from the public highway known as South Capitol Street bordering and outside Bolling Field, past the military guard at the gate to Bolling Field, into the military enclosure and return through said gate to said South Capitol Street bordering the military enclosure. (See Paragraph I (a) of Plaintiff's Request for Admission of Facts Under Rule 36). This is denied by Defendant.

101 Defendant denies that Plaintiff is entitled as a matter of law to a judgement of permanent injunction in accordance with Paragraph (A) of the demand for judgement in the Plaintiff's complaint.

* * * *

103 Filed May 16 1952

Affidavit of Frank L. Grimm

DISTRICT OF COLUMBIA: to wit

Frank L. Grimm, being first duly sworn according to law, deposes and says:

That he is President of M. I. O'Boyle & Son, Inc., a corporation, with its principal office at 817 Michigan Avenue, Northeast in Washington, D. C.

That on the 19th day of February 1952, he supervised the taking of photographs showing the main entrance gate to the military reservation, known as Boling Air Force Base, better known as Bolling Field, in the District of Columbia and the portions of South Capital Street and Portland Street which are contiguous to the entrance to said Bolling Field;

That Exhibits marked "A", "B" and "C", attached hereto and made a part hereof are the photographs referred to in the preceding paragraph, and said photographs were taken in his present and under his supervision.

That Exhibit A is a photograph of that part of the highway which separates from South Capital Street approximately one thousand feet from the entrance to Bolling Field continuing past said entrance and again connecting with said South Capital Street at a point approximately one thousand feet beyond said entrance to Bolling Field; that the metal fence appearing in such photograph encloses the military enclosure of Bolling Field and all buildings in the photograph are within such military enclosure.

That Exhibit B is a photograph of the streets and highways at the entrance to Bolling Field; the portion of a brick building appearing in the photograph is the office of the Air Force Police; the men in the photographs are enlisted members of the Air Force Police who control all vehicular traffic moving to or from Bolling Field; the automobile appearing in the right foreground of the photograph is on Portland Street which passes 104 over South Capital Street at this point, terminating at the entrance to Bolling Field; and the paved area in the left foreground of the photograph is a part of the apron immediately in front of the gate to Bolling Field.

That Exhibit C is a photograph of a tractor-trailer of M. I. O'Boyle & Son, Inc., that is crossing the apron at the entrance to Bolling Field; and the panel truck in the foreground of the photograph is on South Capital Street which passes under Portland Street at this point.

/s/ Frank L. Grimm
Frank L. Grimm

108 Filed May 16 1952 Harry M. Hull, Clerk

Motion By Defendant For Summary Judgement

Comes now the defendant, M. I. O'Boyle & Son, Inc., and moves this Honorable Court for a summary judgement in its favor pursuant to Rule 56 of the Federal Rules of Civil Procedure, and prays that the Complaint of the plaintiff be dismissed and the relief sought therein be denied, and as cause therefor relies upon the following:

1. Plaintiff's Request For Admission of Facts Under Rule 36, filed herein on or about the 5th day of December, 1951.

2. Reply of Defendant To Plaintiff's Request For Admission of Facts Under Rule 36, filed herein on or about the 12th day of December, 1951.

3. The Motion By Plaintiff For Summary Judgement, filed herein on or about the 7th day of May, 1952.

4. Reply of Defendant To Motion By Plaintiff For Summary Judgement and Affidavit In Opposition Thereto, filed herein concurrently herewith.

5. And for other good cause to be shown in the argument herein.

110 Filed May 16 1952 Harry M. Hull, Clerk

*Memorandum of Points and Authorities In Support of
Motion For Summary Judgement in Favor of
Defendant*

AND

*In Opposition To Motion For Summary Judgement In
Favor of Plaintiff*

Section 212 (a) of Part II of the Interstate Commerce Act (U.S. Code Title 49 section 312) provides as follows:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: PROVIDED, HOWEVER, That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: AND PROVIDED FURTHER, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section

111

206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule or regulation of the Commission promulgated thereunder."

Defendant on the 19th day of May, 1947, was issued a certificate of public convenience and necessity authorizing its operation as a common carrier by motor vehicle in interstate or foreign commerce, of petroleum products, in bulk, in tank vehicles, from all points and places in the Washington, D. C. Commercial Zone (which includes all of the District of Columbia) to specified points or areas in Maryland, Virginia and West Virginia; and on the 23rd day of January, 1950, was issued a certificate of public convenience and necessity authorizing its operation as a common carrier by motor vehicle, in interstate or foreign commerce, of petroleum products, in bulk, in tank vehicles, from certain named origins in Pennsylvania and New Jersey to the site of Bolling Field, in Washington, D. C. (See Paragraphs IV and VI of Complaint) These operating authorities have not been revoked, in whole or in part, as provided in Section 212 (a) of Part II of the Interstate Commerce Act.

If there is no specific restriction in the certificate, a carrier may use its operating authorities to perform through service pursuant to any combination of its authority. *Century—Matthews Motor Freight Inc. et al. v. Thrun*, 173 F. (2d) 454, and *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 M.C.C. 610.

There is no specific restriction in either of the above described operating authorities as to the combination thereof for the performance of a through service. The

only condition attached to the use of either certificate is a requirement that defendant "shall render reasonably continuous and adequate service to the public". See Exhibit C attached to Answer filed herein by Defendant.

112 The gateway or entrance to Bolling Field, in Washington, D. C., is a point of service common to the two above-described operating authorities of Defendant, and Defendant is making proper use of its operating authority when it transports shipments from origins in Pennsylvania or New Jersey named in its certificate issued January 23, 1950, via such entrance to destinations authorized in its certificate issued May 19, 1947.

The certificate issued on January 23, 1950, to Defendant authorizes operation to "the site of Bolling Field, in Washington, D. C." and such operating authority authorizes operations only to the entrance of the said Bolling Field. Operations beyond such entrance are subject to the control of the military authorities and the Interstate Commerce Commission does not have the power to authorize or require operations beyond the public highway at said entrance. *Kansas City & Leavenworth Transportation Co. v. U. S.*, 51 Fed. Supp. 916.

From these facts it is clear that the operations of Defendant, complained of by the Interstate Commerce Commission, are conducted pursuant to the operating authority issued to it by the Interstate Commerce Commission and are not unlawful in any respect. Defendant is entitled to judgement as a matter of law.

BRIEF FOR APPELLEE
INTERSTATE COMMERCE COMMISSION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JAN 21 1953

No. 11,535

M. I. O'BOYLE & SON, INC., APPELLANT *Clerk*

v.

INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES,
INC., E. BROOKE MATLACK, INC., AND LEAMAN TRANSPORTA-
TION CORPORATION, APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

CHARLES M. IRELAN,
United States Attorney.

WILLIAM R. GLENDON,
FRANK H. STRICKLER,
Assistant United States Attorneys.

JAMES Y. PIPER,
*Attorney,
Interstate Commerce Commission.*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was it proper for the lower court to consider the Interstate Commerce Commission's interpretations of the scope of appellant's operating rights under two Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission? The court below answered this question affirmatively.

2. Where a motor carrier possesses two certificated operating rights from the Interstate Commerce Commission which may lawfully be joined together by the motor carrier to perform through-service in interstate commerce by reason of the fact that there is a point of service common to both operating rights, namely, a military reservation, which rights the Interstate Commerce Commission has determined may be combined for the purpose of performing such through-service only by a physical operation which traverses the enclosure of the military reservation, whose officials have denied to the motor carrier the use of that enclosure merely for the purpose of its tacking together the said operating rights, is it lawful for such motor carrier to perform the through operation and to combine the operating rights without traversing physically the military reservation in question? The court below answered this question in the negative.

3. Where Division 5 of the Interstate Commerce Commission rendered a decision for the Commission interpreting the operating rights which were granted by the orders of the Commission contained in two certificates of public convenience and necessity issued to the motor carrier, and the entire Interstate Commerce Commission entered an order denying the motor carrier's petition for reconsideration of the decision of Division 5, may the motor carrier, thereafter, in a civil proceeding for an injunction to restrain the carrier from unauthorized operations in violation of the Commission's interpretation of the motor carrier's operating rights, make a collateral attack on the Commission's interpretive order? The court below answered this question in the negative.

INDEX

	Page
Counterstatement of the Facts.....	1
Summary of Argument	5
Argument:	
I. The Commission's Interpretations of the Extent O'Boyle Could Tack Its Certificates Were Properly Before the Court Below	6
II. The Interpretation Was Neither Capricious Nor Arbitrary	11
III. O'Boyle's Through-Service Is Unlawful Unless It Physi- cally Traverses Bolling Field.....	14
IV. The Interpretation Is Not Subject to Collateral Attack....	19
Conclusion	20

TABLE OF CASES

<i>Adirondack Transit Lines, Inc. v. United States</i> , 59 F. Supp. 503, affirmed 324 U.S. 824.....	10, 17
<i>Aero Mayflower Transit Company v. United States</i> , 95 F. Supp. 258	15
<i>Aetna Freight Lines, Inc., Interpretation of Certificate</i> , 48 M.C.C. 610	15
<i>Board of Public Utilities Commissioners v. United States</i> , 21 F. Supp. 543	12, 20
<i>Byers Transportation Company v. United States</i> , 49 F. Supp. 838	15
<i>Century-Matthews Motor Freight, Inc. v. Thrun</i> , 173 F. 2d 454.....	10, 15
<i>Chicago, Indianapolis & Louisville Railway Co., et al., v. United States, et al.</i> , 270 U.S. 287.....	13
<i>Consolidated Freight Ways v. United States</i> , 136 F. 2d 921, cert. denied 320 U.S. 781.....	17
<i>Interstate Commerce Commission v. Consolidated Freightways</i> , 41 F. Supp. 655	13, 20
<i>Interstate Commerce Commission v. G. and M. Motor Transporta- tion Company</i> , 64 F. Supp. 302.....	17
<i>Interstate Commerce Commission v. Southwest Freight Lines</i> , 86 F. Supp. 587, affirmed 184 F. 2d 149.....	10
<i>Leaman Transportation Corporation Extension—Virginia</i> , MC— 104347 (Sub—No. 75).....	3, 11, 18, 19
<i>Malone Freight Lines, Inc. v. United States, et al.</i> , United States District Court for the Northern District of Alabama, Southern District, Civil Action No. 6941, decided October 13, 1952.....	10, 17, 18
<i>Mantorville v. Chicago Great Western Railroad Co.</i> , 8 F. Supp. 791	20
<i>M. I. O'Boyle & Son, Inc., Interpretation of Certificate</i> , 52 M.C.C. 248	7
<i>O'Malley v. United States, et al.</i> , 38 F. Supp. 1.....	13
<i>Pacific Coast Wholesaler's Association v. United States</i> , 81 F. Supp. 991, affirmed 338 U.S. 689.....	10

<i>Southwest Freight Lines, Inc. v. Interstate Commerce Commission</i> , 184 F. 2d 149	17, 20
<i>Transport Corporation of Virginia—Extension</i> , 43 M.C.C. 716	15
<i>United Truck Lines v. Interstate Commerce Commission</i> , 189 F. 2d 816	17
<i>Vener v. Michigan Railroad Co.</i> , 271 U.S. 127	20

OTHER REFERENCES

Interstate Commerce Commission's General Rules of Practice:	
Rule 101	7
Rule 101(e)	12
Rule 102	7, 12
Federal Rules of Civil Procedure, Rule 36	4
Administrative Procedure Act, 5 U.S.C.A. 1001 (d)	9
§ 1004 (d)	9
§ 1009	8
28 U.S.C.A. Sec. 1336, 1398, 2284, 2321-2325	9
Title 49, U.S.C.A.:	
Section 17 (9)	8, 9
Section 305 (h)	9
Section 306 (a) (1)	14
Section 322 (b)	14, 20
Title 49, U.S.C.A. Appendix	7, 12

United States Court of Appeals

No. 11,535

M. I. O'BOYLE & SON, INC., APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES,
INC., E. BROOKE MATLACK, INC., AND LEAMAN TRANSPORTA-
TION CORPORATION, APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE
INTERSTATE COMMERCE COMMISSION

COUNTERSTATEMENT OF THE FACTS

On May 19, 1947, appellant, hereinafter referred to as O'Boyle, was issued a Certificate of Public Convenience and Necessity by which it was granted the right to transport petroleum products, in bulk, in tank trucks, over irregular routes, * * * from points and places in the Washington, D. C., Commercial Zone, 3 M.C.C. 243, to Martinsburg and Shepherdstown, West Virginia, points and places in Maryland and those in part of Virginia on and north of U. S. Highway 60, except those in Accomac and Northampton Counties. (MC—106965, JA 3A, par. IV)

On January 23, 1950, O'Boyle was granted another Certificate of Public Convenience and Necessity whereby it was authorized to transport petroleum products, in bulk,

in tank vehicles, over irregular routes, from points and places in Delaware and Philadelphia Counties, Pennsylvania, and those in Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex, in New Jersey, to the site of Bolling Field in Washington, D. C., and the site of Andrews Field in Prince Georges County, Maryland, traversing Delaware for operating convenience only, with no transportation for compensation on return except as otherwise authorized. (MC-106965 Sub. 15, JA 40A-41A)

In summary, the two above-described certificates granted O'Boyle (1) the right to transport petroleum products from the Washington Commercial Zone to points in Maryland, Virginia and West Virginia; and (2) the right to transport petroleum products from Pennsylvania and New Jersey to the site of Bolling Field and Andrews Field. At the times here pertinent, Bolling Field was within the Washington Commercial Zone.¹ O'Boyle has been combining these two separate operating authorities so as to perform a through-service from origins in Pennsylvania and New Jersey to destinations in Maryland, Virginia and West Virginia.

On July 24, 1950, pursuant to an order of the Commission, the proceeding involving O'Boyle's certificates of May 19, 1947, and January 23, 1950, (Commission's Docket No. MC-106965 Sub. 15) was reopened for reconsideration on the record then existing before the Commission. (JA 5A) This proceeding was instituted on the petition of certain interveners, who contended that O'Boyle was operating without authority from Pennsylvania and New Jersey directly to places in Maryland and Virginia. O'Boyle moved to dismiss the petition and its motion was denied.

Division 5 held the real question presented was whether O'Boyle could tack the two certificates and the manner in which the tacking would be authorized. On October 10, 1950, Division 5 of the Commission issued its "Interpretation of Certificate," in which it decided that O'Boyle might combine or tack the authority granted in the Certificate of January 23, 1950 (MC-106956 Sub. 15) and the Certificate of

¹ The authority to Andrews Field does not enter into consideration in this case and will therefore not be discussed herein.

May 19, 1947, (MC-106965), only by physically operating through the site of Bolling Field, Washington, D. C., as a gateway. It was the conclusion of the Commission, "That the highways or streets leading to the gate or joining the outer boundaries of the military reservation are not authorized points of service which can be said to be points of service common to both authorities and that accordingly the two authorities may not be combined or tacked by any theoretical interchange at any point on any such highway or street. We conclude further that applicant (O'Boyle) may combine or tack the referred-to authorities in the manner hereinbefore discussed provided that the actual operations conducted thereunder include a physical operation through Bolling Field." (JA 9A-15A)

Subsequent to the above "Interpretation of Certificate", O'Boyle, on November 8, 1950, petitioned the entire Interstate Commerce Commission for reconsideration of the interpretation of Division 5. In this petition, O'Boyle contended that the site of Bolling Field should include the highway contiguous to the entrance of Bolling Field; and that it should not be required to operate from the highway, South Capitol Street, to a place inside Bolling Field and then back to the highway. (JA 21A-22A) The entire Commission, on March 5, 1951, issued an order denying O'Boyle's Petition for Reconsideration of the decision of Division 5. (JA 48A-49A)

Also of importance to the question under consideration is the case of *Leaman Transportation Corporation Extension—Virginia*, MC-104347 (Sub-No. 75). (JA 53A-56A) The facts, stated briefly, are as follows. On September 15, 1949, Leaman filed an application with the Interstate Commerce Commission seeking authority to transport petroleum products in bulk, in tank vehicles, from points in the Philadelphia, Pennsylvania Commercial Zone to all points in Virginia, over irregular routes. (The granting of which would have made Leaman a competitor of O'Boyle). O'Boyle intervened in opposition to Leaman's application. (JA 52A, par. 1 (a)). On December 20, 1950, the Commission, Division 5, made a Report and Order on the Leaman

application. It is this report and order which is of significance to this appeal. Before Division 5 could reach its decision on Leaman's application, it was first necessary for the Commission to determine the scope of O'Boyle's operating rights. In so doing, Division 5 interpreted the two O'Boyle certificates now under consideration, in the same manner as did the decision of October 10, 1950. (JA 52A-56A). Subsequent to the report and order by Division 5 of the Interstate Commerce Commission in the Leaman case, O'Boyle did not file, and has not filed, any petition for reconsideration by the entire Interstate Commerce Commission or any action in a District Court seeking either a review of the report and order or an injunction restraining the Interstate Commerce Commission from carrying its order into effect.²

On September 25, 1951, appellee, the Interstate Commerce Commission, filed in the court below, a complaint for Injunction against O'Boyle. (JA 2A-15A)

Following O'Boyle's Answer to the Complaint on October 5, 1951, (JA 15A-41A) appellee, Interstate Commerce Commission, on December 6, 1951, filed a Request for Admission of Facts under Rule 36 of the Federal Rules of Civil Procedure. (JA 41A-45A) On December 13, 1951, O'Boyle filed its reply to Plaintiff's Request for Admission of Facts. (JA 45A-49A) By said reply, O'Boyle admitted that in operating its vehicles on through trips from Pennsylvania and New Jersey³ to Maryland, Virginia and West Virginia⁴ it⁵:

Did not and does not cause its vehicles physically to enter the military reservation of Bolling Air Force Base, Washington, D. C., commonly called Bolling Field, by causing its vehicles to pass from the public

² See Par. 1(c) Plaintiff's Supplemental Request for Admission of Facts Under Rule 36 (JA 52A) and Reply of Defendant to Plaintiff's Supplemental Request for Admission of Facts Under Rule 36 (JA 56A).

³ Authority granted in Certificate of January 23, 1950.

⁴ Authority granted in Certificate of May 19, 1947.

⁵ See Par. 1(a) and 1(b) of Plaintiff's Request for Admission of Facts, JA 41A and 42A and Defendant's Reply to Plaintiff's Request, Par. 1(a) and 1(b), JA 45A.

highway known as South Capitol Street, bordering and outside said Bolling Air Force Base, past the military guard and thence returning through the said gate to said South Capitol Street bordering said base.

O'Boyle also admitted that it:

Did and does cause its vehicle to traverse the public highway known as South Capitol Street bordering and outside the fence enclosing Bolling Air Force Base in Washington, D. C., commonly called Bolling Field, thence on to the "apron" or strip of land approximately 20 to 30 feet in width between said South Capitol Street and the fence enclosing said Air Force Base, and thence returning over said "apron" or strip of land to said South Capitol Street bordering and outside the fence enclosing said Air Force Base.

On April 9, 1952, appellees, Coastal Tank Lines, Inc.; E. Brooke Matlack, Inc.; and Leaman Transportation Corporation, moved for leave to intervene as parties plaintiff (JA 49A-50A). On May 1, 1952, an order was filed granting their intervention. (JA 51A)

SUMMARY OF ARGUMENT

O'Boyle was issued two separate certificates of public convenience and necessity. The latest in point of time authorized O'Boyle to transport petroleum products from Pennsylvania and New Jersey "to the site of Bolling Field", the earliest authorized O'Boyle to transport petroleum products from the Washington Commercial Zone, of which Bolling Field is a part, to points in Virginia, Maryland and West Virginia. Both the Interstate Commerce Commission and the courts permit a tacking or combination of two separate certificates provided there is a point of service common to both certificates through which the carrier physically operates its vehicles. The point of service common to both of O'Boyle's certificates is Bolling Field and O'Boyle operates around rather than through Bolling Field. Therefore, said operation is unauthorized under the terms of its operating rights and in conflict with interpretations and orders of the Interstate Commerce Commission and O'Boyle was properly enjoined by the court below.

ARGUMENT

I

The Commission's Interpretations of the Extent O'Boyle Could Tack Its Certificates Were Properly Before the Court Below

As there were two separate and distinct interpretations by the Commission of O'Boyle's authorized operating rights under the certificates in question each will be discussed separately.⁶

A. THE COMMISSION'S INTERPRETATION CONTAINED IN THE REPORT OF DIVISION 5 ON OCTOBER 10, 1950

With regard to this interpretation, the court's attention will be directed to the facts which brought it about. First was the certificate of May 19, 1947, authorizing O'Boyle to operate its tank trucks *from* the Washington Commercial Zone *to* points in Maryland, Virginia and West Virginia. Second was the certificate of January 23, 1950, authorizing O'Boyle to operate its trucks *from* Pennsylvania and New Jersey *to* the site of Bolling Field. The latter certificate was issued on O'Boyle's application which sought authority from Pennsylvania and New Jersey *to the Washington Commercial Zone*⁷ (JA 29A). The Commission heard testimony of a military official of the Department of the Air Force that Bolling Field and Andrews Field needed the proposed service. (JA 30A) The Commissioners on Division 5 concluded that no real need for the proposed service to the Washington Commercial Zone had been shown, other than to and from the Air Bases. (JA 38A) Accordingly, it authorized issuance of a certificate "to the site of Bolling field". (JA 39A) Thereafter, certain interveners petitioned the Commission for reconsideration and to determine whether O'Boyle was performing an unauthorized service in making direct trips from Pennsylvania and New Jersey

⁶ O'Boyle discusses only the interpretation of Division 5 of October 10, 1950.

⁷ Had this authority been granted, O'Boyle would have had the undoubted right to combine the two certificates it is seeking herein.

to Maryland, Virginia and West Virginia.⁸ O'Boyle was a party to that reconsideration proceeding. Division 5 of the Commission then made the interpretation which O'Boyle is contending was error for the court below to consider. This decision was published in 52 M.C.C. 248, entitled *M. I. O'Boyle & Son, Inc., Interpretation of Certificate*. (JA 10A-15A) Thereafter, O'Boyle filed a petition with the Commission on November 8, 1950, (JA 20A-27A) seeking reconsideration by the *entire* Interstate Commerce Commission of the report of Division 5 of October 10, 1950, which contained the interpretation in question. From an *order* of March 5, 1951, (JA 48A-49A) issued by the entire Interstate Commerce Commission, which denied O'Boyle's petition for reconsideration, O'Boyle sought no further relief either in the Interstate Commerce Commission or by resort to the courts. (JA 45A, par. (d)) It did, however, in defiance of the Commission's interpretation, continue to operate its vehicles in a manner which was unauthorized by its certificates.

O'Boyle contends this interpretation should not have been considered by the court below because "such report was not made a part of an order by incorporation, and no order was issued to implement the findings in such report." In this regard the Court's attention is directed to the closing paragraphs of the report. (JA 15A) It is seen that Division 5 made a finding that the two certificates could be tacked only by operating through the site of Bolling Field, Washington, D. C., as a gateway; and then the report stated:

No further order is necessary, and the proceeding which was reopened for consideration of the petition for interpretation is hereby closed.

As the Commission stated, no *further* order was necessary. There was a valid order in existence, the certificate of January 23, 1950. (JA 40A-41A) It was this *order*, the certificate, which was reopened for reconsideration. The

⁸ This petition was authorized under the Interstate Commerce Commission's General Rules of Practice, Rules 101 and 102; appendix Title 49 U.S.C.A.

report of Division 5 neither added nor removed any rights under the certificate; it merely interpreted and declared what rights had been given in that certificate; and therefore the original order, the certificate, remained in full force and effect. This is why no *further* order was necessary to implement the findings in the report.

O'Boyle did not question the finality of the decision of October 10, 1950, for it filed a petition for reconsideration by the entire Interstate Commerce Commission of the report of Division 5. In its petition O'Boyle stated (JA 21A):

Thereafter, certain Protestants filed a petition for reconsideration. Division 5 reopened the proceeding for reconsideration, and in a *report and order* decided October 10, 1950, found that applicant could * * *. (Emphasis added.)

Surely if O'Boyle considered the report of Division 5 a "mere expression of opinion" it would not have petitioned the entire Commission for reconsideration, and referred to the decision as a report and order. The entire Commission, on March 5, 1951, in ruling on O'Boyle's Petition for Reconsideration, held (JA 49A):

It is further ordered, That applicant's petition be, and it is hereby, denied * * *.

Thus, the interpretation of Division 5 was affirmed by the entire Commission and there was a final administrative determination of the scope of O'Boyle's authority to tack the certificates in question.

O'Boyle also contends there was no relief available in either the Commission or the courts from the decision of Division 5. However, O'Boyle did seek relief from this decision by petitioning the entire Commission for relief. It would also appear that O'Boyle could have sought relief under the provisions of the Administrative Procedure Act or under section 17 (9) of Title 49 of the United States Code.

The Administrative Procedure Act, 5 U.S.C.A. § 1009 provides for Judicial relief from agency determinations in the following language:

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The order by the entire Commission denying O'Boyle's petition was the final administrative action available to it. "Order" is defined in § 1001 (d) of the Act as follows:

(d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing * * *

Section 1004 (d) gives ample authority to the Commission for the interpretations in question. It provides:

(d) The agency is authorized in its sound discretion, with like effect, as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

In view of the provisions of the Administrative Procedure Act, it would appear O'Boyle's contention in this respect is without merit.

In addition, O'Boyle could have sought judicial relief from the decision of Division 5 and the subsequent order denying reconsideration by the entire Interstate Commerce Commission.⁹ Title 49 U.S.C.A. Sec. 17 (9) provides:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

⁹ 28 U.S.C.A. Sec. 1336, 1398, 2284, 2321-2325; 49 U.S.C.A. Sec. 17(9); 49 U.S.C.A. Sec. 305(h).

The above section was invoked in *Malone Freight Lines, Inc. v. United States, et al.*,¹⁰ wherein plaintiff sought to set aside a final order of the Interstate Commerce Commission. The *Malone* case arose when several interveners caused to be heard before the Commission the issue of whether or not *Malone* was engaged in operations beyond the scope of the authority granted in its certificates. The Commission found *Malone* was engaged in an unauthorized operation and issued an order to cease and desist. The Court held that section 17 (9) was properly invoked. It is submitted that O'Boyle could have invoked the same section to obtain judicial relief from the questioned interpretation. See also *Pacific Coast Wholesaler's Association v. United States*, 81 F. Supp. 991, 994, affirmed 338 U. S. 689 (Suit to annul a "requirement"); and *Adirondack Transit Lines v. United States*, 59 F. Supp. 503, affirmed 324 U. S. 824. Surely, as the route to judicial review was open to O'Boyle, the unappealed and unreversed decision of October 10, 1950, was properly considered by the court below.

The Commission's interpretation need not be made in the same proceeding and in such a manner as to bind the applicant for relief. For in many decided cases the courts have looked beyond the proceeding under consideration to decisions and interpretations by the Commission in other cases. *Malone Freight Lines, Inc. v. United States, supra*; *Interstate Commerce Commission v. Southwest Freight Lines*, 86 F. Supp. 587, affirmed 184 F. 2d 149; and *Century-Matthews Motor Freight v. Thrun*, 173 F. 2d 454.

B. THE COMMISSION'S INTERPRETATION IN THE LEAMAN CASE

Not discussed by O'Boyle, but equally a part of the record, is an interpretation contained in a report of the Commission, Division 5, on December 20, 1950. (J.A. 53A-56A.) This report was occasioned when exceptions were filed to an order recommended by an Interstate Commerce

¹⁰ Opinion of a three judge court in the United States District Court for the Northern District of Alabama, Southern District, Civil Action No. 6941, decided October 13, 1952, as yet unreported; application for certiorari pending in the Supreme Court of the United States.

Commission examiner in *Leaman Transportation Company—Extension—Virginia*. The applicant was Leaman Transportation Corporation and the intervener, M. I. O'Boyle and Son, Inc., the appellant herein. The applicant was seeking authority to transport petroleum products in bulk, in tank vehicles, from points in Pennsylvania to points in Virginia. (The granting of this would make Leaman a competitor of O'Boyle.) O'Boyle opposed this application and Division 5 found it necessary to decide the extent of O'Boyle's operating rights under its two certificates before it could decide the merits of Leaman's application. On December 20, 1950, Division 5, in this independent proceeding, found that O'Boyle, in order to combine its certificates, would have to physically operate through Bolling Field. (J.A. 56A.) Subsequent to the issuance of the report and order by Division Five in the Leaman case, appellant herein did not file and has not filed any petition for reconsideration by the entire Interstate Commerce Commission, nor did appellant file an action in any court seeking review of, or an injunction restraining, the Commission's action of December 20, 1950.¹¹ (J.A. 52A-53A.)

From all of the above, it is respectfully submitted that the court below did not err when it considered the Interstate Commerce Commission's interpretations of its own certificates.

II

The Interpretation Was Neither Capricious Nor Arbitrary

O'Boyle contends the report of Division 5 on October 10, 1950, was arbitrary and capricious because:

1. The procedural steps were improper,
2. The Commission failed and refused to consider facts bearing on the term "the site of Bolling Field",
3. The interpretation was illogical and contrary to the meaning of the term, and

¹¹ The argument above under I(A) is equally applicable to this interpretation and to avoid repetition will not be repeated here. See pages 6-10 of this brief.

4. The interpretation is contrary to a construction given the term by the Commission and a court in a prior case.

The above contentions will be discussed separately below.¹²

1. O'Boyle makes this argument without substantiation in this record. For the record herein is incomplete as to the procedural steps taken before the Commission. For this reason alone, it is submitted that O'Boyle cannot, on this appeal, raise this issue. Nor was this point raised in O'Boyle's Petition for Reconsideration by the entire Commission. (J.A. 21A-27A.). On familiar principles O'Boyle is, therefore, precluded from raising it now. *Board of Public Utilities Commission v. United States*, 21 F. Supp. 543.

Moreover, the fallacy of the argument is apparent on its face. (O'Boyle's brief p. 12.) There it is stated that the time to petition for reconsideration expired on December 1, 1949. It must be remembered that O'Boyle did not receive its certificate until January 23, 1950. So O'Boyle is contending that the petition for reconsideration should have been filed before the certificate which raised the question was issued. Beside the foregoing, there is a sound procedural basis for the allowance of the intervener's petition for reconsideration. Rule 102 of the General Rules of Practice of the Interstate Commerce Commission¹³ provides:

Petitions not otherwise covered. When the subject matter of any desired relief is not specifically covered by these rules, a petition seeking such relief and stating the reasons therefor may be filed.

The rule cited by O'Boyle, 101(e), by its terms, applies to *applications* for certificates, not the interpretation of an existing certificate. In addition, O'Boyle's argument as to Rule 101(e) overlooks the provision of that rule that if good cause is shown and leave granted, petitions for reconsideration may be filed after the time limits therein mentioned.

¹² As O'Boyle does not discuss the interpretation rendered in the *Leaman* case, *supra*, it is not deemed necessary to refer to that decision and order herein.

¹³ Found in Title 49 U.S.C.A. Appendix.

As a matter of fact (not of record in this case), the Commission's order of July 24, 1950, reopening O'Boyle's Sub 15 docket for reconsideration on the record then existing (J.A. 5A, par. VII), also found that good cause appeared for filing that petition late, under Rule 101(e).¹⁴

However, the court's attention is invited to O'Boyle's Petition for Reconsideration of the report and order of October 10, 1950. (J.A. 21A) In it, O'Boyle argued that (J.A. 23A), "When applicant operates to the gate of Bolling Field it has conducted all operations which are within the authority granted by the Commission". On page 27A O'Boyle argues that it properly combined its certificates if it transported its shipments "over the highway contiguous to the entrance of Bolling Field and over connecting highways to the final destination".¹⁵ Such was the issue before the Commission.¹⁶ The Commission's Report stated (J.A. 14A):

As used in the certificate the term includes only those grounds within the military reservation and does not include adjacent streets, areas, or land in the vicinity.

Would it not seem logical that there were facts before the Commission in order for the above finding to be made?¹⁷ The absence of evidence of the facts before the Commission compels the courts to accept the Commission's findings. *Chicago, Indianapolis & Louisville Railway Co., et al. v. United States, et al.*, 270 U.S. 287, 295; *Interstate Commerce Commission v. Consolidated Freightways*, 41 F. Supp. 655; *O'Malley v. United States, et al.*, 38 F. Supp. 1, 3. In the *Chicago Railway* case the Supreme Court held:

¹⁴ O'Boyle's brief, p. 14.

¹⁵ And see O'Boyle's contention on this appeal at the bottom of page 15 of its brief. It is there stated, "* * *" but we do vigorously contend as is discussed under the following heading that certain roads located outside of the fenced enclosure are a part of the military reservation".

¹⁶ O'Boyle did not make its present contention in its petition for reconsideration by the entire Commission. (J.A. 21A-27A.)

¹⁷ And note the statements made by O'Boyle in its Petition for Reconsideration by the entire Commission. (J.A. 24A and 25A.)

“Moreover, the Commission found that the South Shore is also engaged in the general transportation of freight. Its finding is necessarily conclusive as the evidence taken before the commission was not introduced below. *Louisiana & Pine Bluff Ry. Co. v. United States*, 257 U.S. 114.”

O’Boyle’s third and fourth contentions will be discussed under the headings below.

III

O’Boyle’s Through-Service Is Unlawful Unless It Physically Traverses Bolling Field

The purpose of the motor carrier act was to regulate motor carriers, and to bring about order and responsibility in the field of motor transportation. Title 49 U.S.C.A. Section 306(a) (1) reads in part as follows:

* * * No common carrier by motor vehicle * * * shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a Certificate of public convenience and necessity issued by the Commission authorizing such operations * * *

Where a carrier engages in an unauthorized operation the courts have the power to issue an injunction restraining such unauthorized operation. Title 49 U.S.C.A. Section 322(b) provides in part as follows:

Jurisdiction of District Courts to restrain violations and enforce orders. If any motor carrier * * * operates in violation of any provision of this chapter * * * the Commission * * * may apply to the District Court of the United States for any district where such motor carrier * * * operates, for the enforcement of such provision of this chapter * * *; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other processes, mandatory or otherwise, restraining such carrier * * *, or its officers, agents, employees, and representatives from further violation of such provision of this chapter * * * and enjoining upon it or them obedience thereto.

As seen above, O'Boyle possesses two certificated operating rights from the Interstate Commerce Commission. The Interstate Commerce Commission has held on many occasions that common carriers, such as O'Boyle may combine separate and unrestricted grants of operating authority and perform a through-service thereby, provided there is a point of service common to both operating authorities, and provided that the resulting operation is physically performed through such common point. *Transport Corp. of Virginia—Extension*, 43 M.C.C. 716 and cases cited; and *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 M.C.C. 610. Federal courts have affirmed the same principle. *Byers Transportation Company v. United States*, 49 F. Supp. 838; *Century-Matthews Motor Freight, Inc. v. Thrun*, 173 F. 2d 454; and *Aero Mayflower Transit Company v. United States*, 95 F. Supp. 258. In the *Century-Matthews* case, where there was a question concerning the tacking of two separate grants of operating authority, the court held, quoting from the decision of the Interstate Commerce Commission in the *Aetna Freight Lines* case:

In such instances where a motor common carrier holds two separate and unrestricted grants of authority which have a point common to both to which the carrier is authorized to transport a given shipment under one authority and from which it is authorized to transport the same shipment under another separate authority, the carrier may furnish through-service on the shipment over a combination of the two separate authorities *provided the physical operation is conducted through the common point.* (Emphasis added.)

Appellees' position is that O'Boyle has not been complying with this principle in that its through-operations have not been physically performed through the point common to both operating authorities.

O'Boyle admits that in operating its vehicles on through trips from Pennsylvania and New Jersey to Maryland, Virginia and West Virginia it:

Did not and does not cause its vehicles physically to enter the military reservation of Bolling Air Force

Base, Washington, D. C., commonly called Bolling Field, by causing its vehicles to pass from the public highway known as South Capitol Street, bordering and outside said Bolling Air Force Base, past the military guard and thence returning through the said gate to said South Capitol Street bordering said base. (J.A. 42A)

O'Boyle also admits that it:

Did and does cause its vehicles to traverse the public highway known as South Capitol Street bordering and outside the fence enclosing Bolling Air Force Base in Washington, D. C., commonly called Bolling Field, thence on to the "apron" or strip of land approximately 20 to 30 feet in width between said South Capitol Street and the fence enclosing said Air Force Base, and thence returning over said "apron" or strip of land to said South Capitol Street bordering and outside the fence enclosing said Air Force Base. (J.A. 42A)

From the above, it is clear that O'Boyle does not perform its service through the site of Bolling Field. O'Boyle never leaves the *public highway*¹⁸ adjacent to Bolling Field. By stretching a point it contends that the so-called "apron" is a part of Bolling Field. The "apron" is not in the fenced enclosure known as Bolling Field and is, in fact, located on land owned and under the jurisdiction of the District of Columbia. The "apron" is located at the intersection of South Capitol and Portland Streets, at the South Capitol Street entrance to Bolling Field. In reality it is nothing more nor less than a street, Portland, leading to Bolling Field. By paragraph four of the stipulation (J. A. 57) the parties hereto have agreed that, "The District of Columbia has jurisdiction over Portland Street to a point inside the gate at Bolling Field." Therefore, even if this question is resolved on a technicality as urged by O'Boyle, it is clear that O'Boyle's through-operations were not performed through the site of Bolling Field.

As a practical matter there can be no question but that O'Boyle does not perform operations through the site of Bolling Field. Unquestionably the service is performed

¹⁸ South Capitol Street.

around Bolling Field. Bolling Field is enclosed by a fence¹⁹ and O'Boyle admits that it never enters the fenced areas in the course of its through operations. (J.A. 42A)

The phrase used in the certificate, "to the site of Bolling Field," is important only so far as direct shipments are made from Pennsylvania and New Jersey to Bolling Field. For then the shipments must be to the site of Bolling Field. This phrase loses significance when the tacking of the two certificates is under consideration. As seen above, under this condition, both the courts and the Commission agree that the through-service must be physically performed through a point of service common to both certificates, which point is Bolling Field.

Federal law holds that it is the province of the Interstate Commerce Commission to interpret its own orders and certificates and such interpretations should be followed and not ignored by the courts unless clearly arbitrary. *Adirondack Transit Lines, Inc. v. United States*, 59 F. Supp. 503, affirmed 324 U. S. 824; *Consolidated Freight Ways v. United States*, 136 F. 2d 921, cert. denied 320 U.S. 781; *Interstate Commerce Commission v. G. and M. Motor Transportation Company*, 64 F. Supp. 302; *Southwest Freight Lines, Inc. v. Interstate Commerce Commission*, 184 F. 2d 149; *Malone Freight Lines, Inc. v. United States, et al., supra*; and *United Truck Lines v. Interstate Commerce Commission*, 189 F. 2d 816. These cases clearly hold that the Commission shall be the final judge of the authority contained in its creations. In the *Adirondack* case it was stated:

* * * At best, the Commission's order is ambiguous. So regarding it, its interpretation is for the Commission; and the courts cannot disregard such an interpretation in those circumstances unless it is clearly erroneous or arbitrary * * *

The case of *Interstate Commerce Commission v. G. and M. Motor Transportation Company, supra*, held:

It will be seen from the above quotation from the Commission's report that it has already construed the cer-

¹⁹ As shown on photographs in the original record in this case, referred to in J.A. 62A.

tificate in question and denied the applicant's contention. In this suit I am of the opinion that I am bound by the Commission's construction of its own certificate, and I am of the opinion that this certificate and the construction stated by the Commission cannot be attacked collaterally, as undertaken by the defendant.

In the *Malone* case, *supra*, it was stated:

The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law.

This being the law, we turn now to the Commission's interpretations. In its report of October 10, 1950, Division 5, held the issue involved to be as follows: (J.A. 12A)

Thus we shall proceed to *interpret and determine* the scope of the operating rights which are in fact granted in the certificate now held by applicant.

Answering this question, Division 5 found: (J.A. 15A)

We find that applicant may combine or tack the authority granted herein in certificate No. MC-106965 (Sub-No. 15) and that in certificate No. MC-106965, only by operations through the site of Bolling Field, Washington, D. C. as a gateway.

The entire Commission affirmed this decision by its denial of O'Boyle's Petition for Reconsideration. (J.A. 49A)

This interpretation was referred to and given effect in the *Leaman* application, *supra*. (J.A. 53A-56A) In that proceeding, Division 5 was interested in whether O'Boyle could physically operate through Bolling Field with its direct shipments. It was concluded that it was doubtful that O'Boyle could physically operate through Bolling Field as required by the prior interpretation. For these reasons it is submitted that O'Boyle was unlawfully performing its through-service.

In addition to the two interpretations by Division 5 of the Commission as to the extent of O'Boyle's right to com-

bine the two operating authorities in question, discussed and decided in the report of October 10, 1950 (J.A. 9A-15A) and in the *Leaman* decision of December 20, 1950, the attention of the Court is called to a recent decision of Division 3 of the Commission, rendered October 6, 1952, in *Petroleum Products—O'Boyle Tank Lines*. In that case Division 3 ordered canceled tariffs filed by O'Boyle to cover the same point-to-point service from northern origins to southern destinations which is the subject-matter of the instant injunction proceeding, on the ground that O'Boyle "may not now lawfully operate from and to the considered points." Division 3 cited the fact that O'Boyle "has been expressly prohibited from entering Bolling Field for the purpose of combining or tacking its separate operating authorities." The basis for such a statement of fact is the letter from the Office of the Judge Advocate General of the Department of the Army dated November 17, 1950, to the Secretary of the Interstate Commerce Commission, copies of which were sent to appellant's counsel in this case, which letter is an admitted fact herein (J.A. 42A-45A, par. (c)).

It is appreciated that this recent decision respecting O'Boyle's tariffs was rendered after issuance of the injunction which is the basis of this appeal, and that this decision is not part of the record of the Court below in this case, but it contains a discussion and confirmation by another Division of the Interstate Commerce Commission of the very arguments on which appellees rely to sustain the action of the Court below in implementing the two interpretations of O'Boyle's rights by Division 5. This decision is a public document rendered pursuant to 49 U.S.C. Secs. 14 and 17(3), not yet printed in the published reports of the Commission, and for that reason it is given in full in the Appendix to Appellees' Brief for the information of the Court.

IV

The Interpretation Is Not Subject to Collateral Attack

O'Boyle's argument here is but a collateral attack upon a decision of the Commission. This suit was instituted by

the Commission for the purpose of restraining certain unauthorized operations by O'Boyle. As shown above, O'Boyle had the opportunity to judicially review the decision complained of herein. It cannot attack the interpretation in this proceeding. *Venner v. Michigan Railroad Co.*, 271 U. S. 127; *Southwest Freight Lines v. United States*, *supra*; *Interstate Commerce Commission v. Consolidated Freightways, Inc.*, 41 F. Supp. 651, 655; *Board of Public Utility Commissioners v. United States*, 21 F. Supp. 543, 547; *Mantorville v. Chicago Great Western Railroad Co.*, 8 F. Supp. 791, 795.

The *Southwest Freight Lines* case also involved a proceeding by the Interstate Commerce Commission under the provisions of Title 49 U.S.C.A. Section 322(b) to enjoin Southwest Freight Lines from engaging in unauthorized operations. The court stated:

In short, the only issue here is the interpretation of the certificate granted to appellant by the Commission.

The Court then held:

In proceedings under 49 U.S.C.A. Section 322(b), the courts may not usurp the jurisdiction of the Commission by granting appellant what the Commission has denied. The appellant may not convert the present action into a direct attack on the validity of the order of the Commission evidenced by the certificate in this case.

For this reason alone, O'Boyle's attack on the interpretation must fail.

CONCLUSION

From all of the above it is respectfully submitted that the judgment of the District Court was correct and should be affirmed.

CHARLES M. IRELAN,
United States Attorney.

WILLIAM R. GLENDON,

FRANK H. STRICKLER,

Assistant United States Attorneys.

JAMES Y. PIPER,

Attorney, Interstate Commerce Commission.

CHRONOLOGICAL INDEX TO JOINT APPENDIX

Date	Description	Joint Appendix)
5-19-47	O'Boyle certificate in M.C.—106965.....	3A (par IV)
11-1-49	Interstate Commerce Commission report and order in O'Boyle's Sub. 15 docket.....	28A-39A
1-23-50	O'Boyle certificate in Sub. 15 docket.....	40A-41A
7-24-50	O'Boyle certificate in Sub. 15 docket.....	5A (par. VII)
10-10-50	Division 5 report on reconsideration in Sub. 15 docket.	9A-15A
11-8-50	O'Boyle petition to Interstate Commerce Commission for reconsideration of Division 5 decision of October 10, 1950.....	20A-27A
11-17-50	Judge Advocate General's letter to Secretary of Interstate Commerce Commission.....	43A-45A
12-20-50	Division 5 decision in Leaman Transportation Corporation Sub. 75 docket.....	53A-56A
3-5-51	Order by Interstate Commerce Commission denying O'Boyle's petition for reconsideration of November 8, 1950.....	48A-49A
9-25-51	Interstate Commerce Commission complaint filed in court, with Exhibit A thereto.....	2A-15A
10-5-51	O'Boyle answer to complaint, with Exhibits A, B, and C thereto.....	15A-41A
12-6-51	Plaintiff's requests for admission of facts under Rule 36	41A-45A
12-13-51	Reply of defendant to plaintiff's requests for admission of facts, and Exhibit D thereto.....	45A-49A
4-9-52	Motion by interveners for leave to intervene.....	49A-50A
5-1-52	Order of court granting intervention.....	50A-51A
5-8-52	Plaintiff's motion for summary judgment.....	51A
5-16-52	Defendant's reply to plaintiff's motion for summary judgment, and affidavit attached thereto, with Exhibits A, B, and C thereto.....	60A-62A
5-16-52	Defendant's motion for summary judgment.....	63A
5-16-52	Defendant's memorandum in support of defendant's motion for summary judgment and in opposition to plaintiff's motion therefor.....	64A-66A
5-28-52	Plaintiff's supplemental request for admission of facts under Rule 36, and Exhibit A thereto.....	52A-56A
6-5-52	Defendant's reply to plaintiff's supplemental request for admission of facts.....	56A-57A
6-18-52	Stipulation of facts.....	57A-58A
7-7-52	Judgment of permanent injunction.....	58A-60A

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. M-3788²⁰

PETROLEUM PRODUCTS—O'BOYLE TANK LINES

Submitted February 14, 1952. Decided October 6, 1952.

Proposed new point-to-point motor common carrier commodity rates on petroleum products, in bulk, in tank-truckloads, from specified points in New Jersey and Pennsylvania to certain points in Maryland, Virginia, and West Virginia found not justified and ordered canceled. Proceedings discontinued.

Dale C. Dillon and Clarence D. Todd, for respondent in both proceedings.

Paul F. Barnes for protestants in I. and S. No. M-3788.

Harry S. Elkins for protestants in I. and S. No. M-3336.

Raymond Krebill for Secretaries of the Army and the Air Force in I. and S. No. M-3336.

REPORT OF THE COMMISSION

Division 3, Commissioners Patterson, Johnson, and Knudson

By Division 3:

These two proceedings present the same issues and will be considered in a single report. Exceptions to the orders recommended by the examiners were filed in each of the proceedings by protestants, and respondent replied thereto. Our conclusions differ from those recommended.

By schedules filed to become effective May 1, 1950, in I. and S. No. M-3336, and June 23, 1951, in I. and S. No. M-3788, the respondent, M. I. O'Boyle & Son, Inc., doing business as O'Boyle Tank Lines, of Washington, D. C., proposed to establish new point-to-point motor common

²⁰ This report also embraces Investigation and Suspension Docket No. M-3336, Petroleum Products Over O'Boyle Tank Lines.

carrier commodity rates on petroleum products, in bulk, in tank-truckloads, from certain points in New Jersey and Pennsylvania to certain points in Maryland, Virginia and West Virginia.²¹ Upon joint protest of E. Brooke Matlacke, Inc., and Leaman Transportation Corporation, in each proceeding, operation of the schedules was suspended until December 1, 1950, in I. & S. No. M-3336, and until January 23, 1952, in I. and S. No. M-3788, and respondent has voluntarily postponed the effective date of the latter schedules indefinitely. The schedules proposed in I. and S. M-3336 were cancelled on November 2, 1950, and as the same issues are presented in I. and S. No. M-3788, the proceeding in I. and S. No. M-3336 will be discontinued.

Protestants do not question the level of the proposed rates, but dispute the right of respondent to provide service under the proposed schedules. Respondent holds a certificate, No. MC-106965, which authorizes the transportation of petroleum products, in bulk, in tank trucks, from points in the Washington, D. C., commercial zone to points in Maryland and points in specified portions of Virginia and West Virginia. It also holds a certificate, No. MC-106965 (Sub-No. 15), authorizing it to transport petroleum products, in bulk, in tank vehicles, from points in Delaware and Philadelphia Counties, Pa., and Bergen, Essex, Gloucester, Camden, Hudson, Union, and Middlesex Counties, N. J., to the site of Bolling Field, in Washington, and the site of Andrews Field in Prince Georges County, Md. The proposed schedules apply from origins authorized in No. MC-106965 (Sub-No. 15) to destinations authorized in No. MC-106965. Thus the question presented is whether respondent can render service under the proposal by "tacking" or "combining" its authority in No. MC-106965 (Sub. No. 15) with that in No. MC-106965.

The right of a motor common carrier to "tack" or "combine" separate grants of authorities which are not restricted against tacking is well settled. The only requirement is that there must be a point of service common to both

²¹ Destinations in West Virginia not embraced in I. and S. No. M-3336.

operating authorities and the physical operation must be rendered through such common point. *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, and *Valley Motor Lines, Inc. v. Western Truck Lines*, 47 M.C.C. 718. Bolling Field is located within the Washington commercial zone and is a point common to both authorities considered herein, but Andrews Field is not so located and is not a gateway point. See *Washington, D. C., Commercial Zone*, 3 M.C.C. 243, and 48 M.C.C. 460. The extent to which a motor common carrier may operate within a military reservation to which service has been authorized is a matter which may be determined by the carrier and the military officials of the reservation. *Missouri Pac. Transp. Co. Extension—Fort Leavenworth*, 41 M.C.C. 545. Therefore, the fulfillment here of the requirements that there must be a point of service common to both operating authorities and that operation must be performed physically through such common point, is contingent upon the approval by the governing officials for respondent to conduct physical operations through Bolling Field. *M. I. O'Boyle & Son, Inc.—Interpretation of Certificate*, 52 M.C.C. 248.

Respondent has the approval of the governing officials to make deliveries at Bolling Field, but has been expressly prohibited from entering Bolling Field for the purpose of combining or tacking its separate operating authorities. It proposes to tack or combine the considered authorities by operating, and has operated, from and to the considered points, through or over an apron or driveway leading from the highway to an entrance gate at Bolling Field. The common point of service in respondent's certificate in No. MC-106965 (Sub-No. 15) is the *site* of Bolling Field. A site is a plot of ground suitable or set apart for some specific use, and occupied for that purpose. In the certificate it is used to include the grounds within Bolling Field, and does not include adjacent streets, areas, or land in the vicinity. The operations conducted by respondent from and to the considered points have not been physically performed through Bolling Field, and a permanent injunction has been issued enjoining respondent from the conduct of such opera-

tions in *Interstate Commerce Commission v. M. I. O'Boyle & Son, Inc., d/b/a O'Boyle Tank Lines*, Civil No. 4027-52, U.S. D.C., D. of Columbia, from which respondent has noted an appeal. A motion to stay the issuance of such injunction was denied by the Court.

The Interstate Commerce Act does not permit the filing of tariffs which contain rates for service which cannot be provided by the carrier, and in a number of proceedings, schedules covering service which the respondents therein could not lawfully render have been found unlawful and ordered canceled. See *Iron and Steel Articles—Central Territory*, 53 M.C.C. 769, and cases cited therein.

We find that the proposed schedules are unlawful because respondent may not now lawfully operate from and to the considered points. An order will be entered requiring the cancellation of the proposed schedules in I. and S. No. M-3788, and discontinuing the proceedings in I. and S. No. M-3788 and I. and S. No. M-3336.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of October, A. D. 1952.

INVESTIGATION AND SUSPENSION DOCKET No. M-3788

PETROLEUM PRODUCTS—O'BOYLE TANK LINES

INVESTIGATION AND SUSPENSION DOCKET No. M-3336

PETROLEUM PRODUCTS OVER O'BOYLE TANK LINES

It appearing, That in I. and S. No. M-3788, by order dated June 22, 1951, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules designated in the said order, and suspended the operation of the said schedules until January 23, 1952, and respondent has postponed the effective date indefinitely;

It further appearing, That in I. and S. No. M-3336, by order entered April 26, 1950, the Commission, by division 2, entered into a hearing concerning the lawfulness of rates, charges, regulations and practices stated in the schedules designated in said order and suspended the operation of such schedules until December 1, 1950, and that respondent canceled the said schedules on November 2, 1950;

And it further appearing, That a full investigation of the matters and things involved in these proceedings have been made, and that the said division, on the date hereof has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent in I. and S. No. M-3788 be, and it is hereby, notified and required to cancel the said schedules on or before November 15, 1952, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

It is further ordered, That the proceedings in I. and S. M-3788 and in I. and S. M-3336 be, and they are hereby, discontinued.

By the Commission, division 3.

[SEAL.]

GEORGE W. LAIRD,
Acting Secretary.

